

2. On December 15, 2006, Plaintiffs Magten Asset Management Corporation ("Magten") and Law Debenture Trust Company of New York ("Law Debenture") (collectively "Plaintiffs") filed a Motion to Compel Production of Documents and for Expenses (the "Motion to Compel") against Northwestern Corporation ("Northwestern") in Civil Action No. 04-1494-JJF and against Defendants

Mike J. Hanson ("Hanson") and Ernie J. Kindt ("Kindt") (collectively "Defendants") in Civil Action No. 05-499-JJF.¹

3. Upon the completion of briefing on Plaintiffs' Motion to Compel, a teleconference was held with the Special Master and counsel for the parties on January 15, 2007.

4. At the conclusion of that hearing, I ordered further briefing with respect to Plaintiffs' Motion to Compel. That additional supplemental briefing was completed on January 25, 2007.

5. A second conference with counsel for the parties and the Special Master was held in person on January 29, 2007. A copy of the transcript of that hearing is attached hereto as Exhibit A.

6. As of the date of the hearing on January 29, 2007, Defendants Northwestern, Hanson, and Kindt had produced approximately 200,000 pages of documents to Plaintiffs.

7. During the course of the January 29 hearing, the parties presented their respective positions with respect to the relevance, scope, burden and timing of responses as to the document requests at issue with respect to Plaintiffs' First and Second Requests for Production of Documents.

8. During the course of the above-referenced hearing, the Special Master and the parties addressed certain specific document requests in Plaintiffs' First Request for Production of Documents, and all of the document requests contained in Plaintiffs' Second Request for Production of Documents.

¹ Only Plaintiff Magten has asserted claims against Hanson and Kindt in Civil Action No. 05-499-JJF.

9. My rulings with respect to each of the document requests at issue in Plaintiffs' First and Second Requests for Production are contained in the Hearing Transcript of January 29, 2007, at pages 63-116. The rulings set forth therein are incorporated by reference in this Report and Recommendation to the Court.

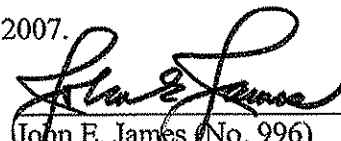
10. As part of my resolution of the disputes with respect to the requests for production at issue, I also determined the time by which Defendants were to produce documents and privilege logs consistent with my rulings at the January 29 Hearing.

11. In this regard, I ordered Defendants to continue to produce documents on a rolling basis to Plaintiffs and that, except for good cause shown, Defendants are required to have substantially completed their production of documents in response to Plaintiffs' two document requests, consistent with my rulings on such documents requests, no later than March 16, 2007. Additionally, I ordered Defendants to produce any privilege logs to Plaintiffs, relating to Plaintiffs' document requests that were the subject of the January 29 Hearing, no later than March 23, 2007.

12. Accordingly, for the reasons reflected in the January 29 Hearing Transcript, Plaintiffs' Motion to Compel is GRANTED in part and DENIED in part. Plaintiffs' request for an award of attorneys' fees and expenses is DENIED.

13. This Report and Recommendation will become a final order of the Court unless objection is timely taken in accordance with the provisions of Fed.R.Civ.P. 53(g).

ENTERED this 1st day of February, 2007.


John E. James (No. 996)
Special Master

cc: The Honorable Joseph J. Farnan, Jr.
775761/30048-001

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MAGTEN ASSET MANAGEMENT CORP.
and LAW DEBENTURE TRUST COMPANY
OF NEW YORK,

Plaintiffs,

v.

NORTHWESTERN CORPORATION,

Defendant.

MAGTEN ASSET MANAGEMENT CORP.,

Plaintiff,

v.

MIKE J. HANSON and ERNIE J. KINDT,

Defendants.

)
)
)
)
) Civil Action
) No. 04-1494-JJF
)
)
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)
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) Civil Action
) No. 05-499-JJF
)
)
)

Potter, Anderson & Corroon LLP
1313 North Market Street
Wilmington, Delaware

Monday, January 29, 2007
2:30 p.m.

BEFORE: JOHN E. JAMES, ESQ.
SPECIAL DISCOVERY MASTER

TRANSCRIPT OF PROCEEDINGS

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14

15 - - - - -

16 SPECIAL DISCOVERY MASTER JAMES: Special
17 Master James. We're resuming the hearing that was
18 held on January 15, 2007 in the consolidated cases of
19 Magten Asset Management Corp. and Law Debenture Trust
20 Company of New York versus NorthWestern Corporation
21 and Magten Asset Management Corp. versus Mike J.
22 Hanson and Ernie J. Kindt.

23 For the record, let's have each of the
24 counsel, principal counsel who will be speaking today
identify themselves and of course Delaware counsel
should do so as well beginning with the plaintiff.

MS. STEINGART: Thank you.

Bonnie Steingart from Fried, Frank on
behalf of Magten.

MS. DUBE: Dale Dube of Blank, Rome on



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1 behalf of Magten.

2 I'm also serving as Delaware counsel just
3 for today on behalf of Law Debenture Trust Company.

4 MR. SNELLINGS: John Snellings from Nixon
5 Peabody. I represent Law Debenture Trust Company of
6 New York, the indenture trustee.

7 MR. PIZZURRO: Joseph Pizzurro, Curtis,
8 Mallet-Prevost, representing NorthWestern.

9 MS. COUNIHAN: Victoria Counihan of
10 Greenberg, Traurig, local counsel to NorthWestern.

11 MS. KRAFT: Denise Kraft of Edwards,
12 Angell, Palmer & Dodge, local counsel representing
13 Mike Hanson and Ernie Kindt.

14 MR. KALECZYC: And Stan Kaleczyc,
15 Browning, Kaleczyc, Berry & Hoven, representing Hanson
16 and Kindt.

17 SPECIAL DISCOVERY MASTER JAMES: Thank
18 you.

19 I obviously have read all of the
20 subsequent submissions which I appreciate receiving
21 from you on the rather expedited schedule that I
22 requested. The first thing I would like to know
23 before we hear a little bit of the argument with
24 respect to the pending motions is whether there's been



1 any movement on the stipulations that were discussed
2 during the last hearing with respect to documents or
3 perhaps things beyond documents, stipulations of a
4 documentary character or otherwise that the parties
5 have been able to reach since our last meeting.

6 MS. STEINGART: We have provided to
7 NorthWestern, we were hoping to provide by Monday but
8 did not provide it until Tuesday, stipulations that we
9 could talk about with respect to the assets
10 transferred from Clark Fork to NorthWestern, the
11 liabilities assumed and the financial condition of
12 Clark Fork subsequent to that transfer.

13 So I think those stipulations are the
14 subject now or will be the subject of give-and-take
15 between NorthWestern and Magten. I think that we all
16 anticipate being able to reach a conclusion
17 satisfactorily on those, but we'll see. Those are
18 stipulations that we could talk about because in a
19 sense much of the information about the value of those
20 assets and liabilities were available during the
21 bankruptcy proceeding so to the extent there might
22 have been additional documents but some of the values
23 were the subject of those proceedings, so we felt that
24 we could intelligently talk with NorthWestern about



1 stipulations on those topics.

2 There's a second area of stipulation that
3 arose in connection with the submission by
4 NorthWestern and at this point we haven't seen actual
5 stipulations. It hasn't been very long since that
6 topic was raised, but at this point one of our
7 concerns is that because we have not begun to fact
8 gather at all on that issue it's really very hard for
9 us to know what we can stipulate to and what the
10 extent of either the wrongdoing or the issues are with
11 respect to the financials that were restated. So from
12 that point of view, though we do believe that there
13 can be stipulations prior to trial of these matters, I
14 don't know at this point, not having seen any of those
15 documents, what stipulations we can agree to.

16 Now, to the extent that NorthWestern is
17 saying that well, they will stipulate that the
18 financials used during that period of time were
19 materially false and that they were knowingly
20 materially false, I don't know why we're not settling
21 the case if we're talking about those kinds of
22 stipulations. But, again, because we are without any
23 information about NorthWestern's conduct and knowing
24 use of untrue financial statements for the period



1 preceding and during the transfer, it's hard for us to
2 agree to stipulations.

3 SPECIAL DISCOVERY MASTER JAMES:

4 Mr. Pizzurro, any comment on that?

5 MR. PIZZURRO: We're reviewing the
6 stipulation of the value. I have to say I think it
7 will require a lot of work based on what we received
8 and I also would say that I think a lot of the value
9 from our point of view of the stipulation may have now
10 just evaporated because most, if not all, of the
11 documents that we had hoped to save in production as a
12 result of the stip. have now been produced. There may
13 be a few others. I'm not undertaking to represent
14 that all of those have been produced, but by far and
15 away a vast majority have been.

16 Just for the record, as of today I think
17 we're in excess of 200,000 pages that have been
18 produced by NorthWestern to the plaintiffs and that
19 entails all of the production of documents from
20 defendants Hanson and Kindt.

21 On the stipulation relating to the
22 financial statements, I don't want to address
23 everything that Ms. Steingart just said because I
24 think that that's going to get us into some of the



1 argument that you're going to hear in a moment. I'm
2 going to let her go ahead and state her position.

3 Obviously, our position is that
4 stipulations such as the one she outlined might not
5 lead to settlement, but it certainly would preclude an
6 awful lot of even the discovery that we would have to
7 acknowledge as relevant given the ruling of Judge Case
8 and Judge Farnan. But we believe with an appropriate
9 stipulation there's very little discovery that would
10 be left, but I'll address it when Ms. Steingart does.

11 SPECIAL DISCOVERY MASTER JAMES: Okay. I
12 read the supplemental papers. I have some questions.

13 But, Ms. Steingart, why don't you briefly
14 restate your position, not repeating too much of what
15 you said before, but where things stand now and what
16 you're looking for.

17 MS. STEINGART: Okay. I think that it is
18 helpful to start with where things stand now because
19 during the pendency of your consideration of these
20 matters we have been receiving production from
21 NorthWestern. As Mr. Pizzurro has indicated, we have
22 been informed that the production on behalf of Hanson
23 and Kindt is now complete. We have received
24 additional documents from NorthWestern.



1 We don't know if they're at the end of
2 their response to the document production, but
3 certainly we only want what's responsive and if you're
4 there, that would be fine. I think that would then
5 turn to the issues that remain.

6 SPECIAL DISCOVERY MASTER JAMES: Excuse
7 me. With respect to your response, I would like
8 you to focus on -- I mean, to me the three issues that
9 are outstanding are timing, relevance, scope/burden
10 that I'm reading from the papers, from the argument
11 the previous time and from the papers that have been
12 submitted to date.

13 Obviously things have changed a little
14 since the last hearing because at the last hearing
15 NorthWestern had produced 60,000 pages, as I recall,
16 and you're up to 200,000 now in two weeks and perhaps
17 more is coming. We will get to that in a minute.

18 So when you discuss these issues those are
19 the principal things I want to focus on because
20 initially this was from your perspective a timing
21 issue and certainly that's still on the plate. And I
22 guess I should ask has NorthWestern come back to you
23 and said we can finish by X date or have they said we
24 can't now because from our perspective the scope of



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1 your request or the relevance of your request is not
2 within the ambit of what we think is appropriate?

3 MS. STEINGART: Well, certainly as to
4 timing, we've not received an indication of a date
5 upon which document production will be complete. If
6 it is complete, I'm sure that we'll hear that, but we
7 have not heard that it is complete, except with
8 respect to Messrs. Hanson and Kindt, although we have
9 received additional documents.

10 Now, timing also goes to the production
11 with respect to the SEC and the items contained in the
12 second document request. To some extent, we believe
13 that those were encompassed in the first and we can
14 talk about the items in the first document request
15 that we think encompass those. And the issues with
16 respect to timing, relevance, scope and burden I think
17 certainly pertain particularly to those and those
18 address some of the objections that have been raised
19 by NorthWestern.

20 Certainly as to relevance, Rule 26 is
21 pretty clear that a document must be produced in
22 connection with discovery if it's relevant to a claim
23 or a defense and here there can be no question but
24 that it's relevant to the defense that NorthWestern



1 has raised, which is that they were properly released
2 or Clark Fork was properly released of all liability.
3 And Judge Case's opinion said well, if there was fraud
4 in procuring that release, if the financial statements
5 of NorthWestern that were used in connection with this
6 transaction were fraudulent, then the release would
7 not be effective.

8 So certainly documents that have been
9 given to the SEC in the SEC's investigation of the
10 financial statements, the public financial statements
11 of NorthWestern that were used during the period of
12 the transfer are relevant. The complaint alleges both
13 that NorthWestern was insolvent at the time of the
14 transfer and immediately before the transfer and the
15 fact that NorthWestern had financials out there that
16 said it wasn't and then three days after the transfer
17 said that its financials were being reviewed and three
18 months after it said that they were almost \$900
19 million in error --

20 SPECIAL DISCOVERY MASTER JAMES: Excuse
21 me. I don't think that NorthWestern is really
22 contesting that. As I understand their papers, they
23 admit that they had to restate their earnings or their
24 financials or whatever to the SEC.



1 And I also think -- correct me if I'm
2 wrong -- that they have produced some SEC documents or
3 some documents they produced to the SEC.

4 MS. STEINGART: Well, I would assume that
5 there are documents that in a random manner were
6 responsive to our request and to the SEC. We have
7 not, we have not received as far as I understand it
8 the SEC production as such. And Mr. Pizzurro can
9 correct me if I'm wrong, but I thought it was
10 resisting that request that was the subject of the
11 supplemental submissions and I do not believe that we
12 have received the SEC production.

13 SPECIAL DISCOVERY MASTER JAMES: Well, the
14 SEC, quote, production -- just let me ask you and then
15 I'm going to come back to you.

16 Just quickly, some of the documents that
17 you produced that are SEC documents, were they part of
18 the SEC production?

19 MR. PIZZURRO: Yes.

20 SPECIAL DISCOVERY MASTER JAMES: Okay.

21 MS. STEINGART: So I think that its
22 relevance is beyond dispute at this point. I think
23 the issue of the falsity of NorthWestern's financials
24 during this entire period has been on the table since



1 Judge Case's decision. Certainly Judge Case refers to
2 it. Judge Farnan refers to it. There's an issue that
3 the Montana court, this decision that the Montana
4 court issued in connection with a motion by Hanson and
5 Kindt where the Montana court refers to the falsity of
6 the public financials. So this is no surprise. This
7 is not something that was unknown to NorthWestern from
8 the get-go. So certainly it's relevant.

9 I think that with respect to timing, scope
10 and burden, suffice it to say that NorthWestern has
11 indicated that it already has these documents
12 segregated and reviewed; that they have been produced
13 to the government electronically so they're already on
14 CD's. We have indicated our willingness to execute a
15 confidentiality agreement and certainly any documents
16 that are produced in advance to our executing that
17 would be governed by the local rule here that would
18 require once such request is made all documents be
19 held for attorneys' eyes only.

20 So I think that as to timing, scope and
21 burden that there should not be delay or new reviews
22 and new gathering of information that needs to be
23 done.

24 SPECIAL DISCOVERY MASTER JAMES: Just as a



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1 point of information then, you don't have a
2 confidentiality order in place in this case?

3 MS. STEINGART: We don't have one in
4 place. We received I think right before our hearing
5 on the 15th a draft and we had I think about a week
6 ago returned the markup and we haven't heard back on
7 the markup. I think we're very close.

8 MR. PIZZURRO: I think based on what we
9 received we will have one before the end of this week
10 for sure.

11 SPECIAL DISCOVERY MASTER JAMES: So that's
12 not an issue.

13 MR. PIZZURRO: That's not an issue.

14 MS. STEINGART: That's not an impediment.
15 And we have been holding things confidential since we
16 received the request and we have no dispute or problem
17 with that whatsoever.

18 SPECIAL DISCOVERY MASTER JAMES: Okay.

19 MS. STEINGART: I think when we're talking
20 about the SEC production as to timing, scope and
21 burden, it should not delay things. It might be a
22 burden for us to look at it, but we have asked for it
23 and it goes into the school of be careful what you
24 wish for, I think. But we think it's relevant and we



1 think that they have already done the work that's
2 necessary to amass it.

3 There's also been some question about the
4 relevance of things that were provided to regulators
5 in addition to the SEC. And the issue there is during
6 the time of the transfer, of the going flat
7 transaction and not only was there information in
8 financials of NorthWestern given to the trustee, they
9 were also given to regulators. And it's just further
10 evidence of what NorthWestern was doing with respect
11 to obtaining approvals and reliance based on these
12 false financials, approvals and reliance in connection
13 with the transfer of these very assets.

14 The regulators for the energy regulators
15 would not have permitted a transaction where these
16 assets were going to an already-insolvent entity. So
17 it really buttresses and provides further evidence of
18 the conduct of NorthWestern at the time in getting
19 approvals for the transfer of these assets based on
20 financials that were materially false and, if the
21 offer of the stipulation is correct, financials that
22 NorthWestern knew were materially false.

23 At the same time as this was going on, you
24 had the officers and directors or the officers of



1 NorthWestern based on these materially false
2 financials getting bonuses and other income based on
3 what appeared to be the income and success of
4 NorthWestern when there was none. And this also goes,
5 this is also evidence of the same kind of wrongdoing
6 and the same kind of scheme, the same use of this
7 public financial information, the same financials that
8 are inaccurate that were used for the going flat, that
9 were used for the trustee, that were used for the
10 regulators were also offered to the board so that the
11 directors could say hey, look at me; I deserve a
12 bonus.

13 SPECIAL DISCOVERY MASTER JAMES: That's
14 one thing that has interested me because can you
15 explain to me how the information given to the Montana
16 regulators and then of course the Department of
17 Justice probe and then the McGreevey case, how from
18 your perspective the misrepresentations made to those
19 organizations would have differed, if at all, except
20 they would have been made to a different party than
21 the ones that are being produced to the SEC?

22 MS. STEINGART: Right. I agree with you,
23 sir. They don't differ. They have the same
24 misrepresentations. It's just further evidence that



1 this was not a random or thoughtless or somehow
2 innocent act.

3 It shows that it was a scheme, that it was
4 a fraud and it just helps to prove that what was being
5 presented to the trustee and the results that
6 NorthWestern hoped to obtain by presenting false
7 information to the trustee were the same results that
8 they hoped to obtain by presenting the false
9 information elsewhere. That's what it's in aid of.

10 SPECIAL DISCOVERY MASTER JAMES: That goes
11 back to the standard for fraudulent inducement. What
12 is your understanding of what you have to prove, you
13 and Law Debenture Trust have to prove to establish
14 that you were fraudulently induced to sign the release
15 in the third amended indenture?

16 MS. STEINGART: Well, fraud is not
17 something that one can establish without showing some
18 purpose or intent on the part of NorthWestern. So I
19 think that we should attempt to show -- I mean a court
20 may find that constructive fraud under these
21 circumstances are enough and under constructive fraud
22 specific as opposed to general intent is not as
23 necessary.

24 But if their defense is based on, if they



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1 view the defense as you have to show that we really
2 had specific intent to defraud this trustee, I think
3 showing the manner in which these false financials
4 were used to induce others to give consents and
5 releases shows that knowledge in a more compelling way
6 than if you just show one use of it.

7 So just from a trial point of view a judge
8 may say once you show they knew these were false you
9 don't have to show me they knew they were false in
10 five different settings. But we're, remember, still
11 at the discovery stage and showing that there was an
12 intent to gain approvals and gain personal enrichment
13 by using these same false financials in other settings
14 does help to establish the specific intent of the
15 fraud.

16 SPECIAL DISCOVERY MASTER JAMES: What does
17 the Department of Justice probe relate to?

18 MS. STEINGART: The Department of Justice
19 probe relates to the same thing as the SEC. So I
20 think that the same series of financials and the same
21 public issuance of these financials, knowing they were
22 false, is the subject of the DOJ inquiry.

23 SPECIAL DISCOVERY MASTER JAMES: Do you
24 have any sense of what portion of the documents you're



1 seeking are publicly available?

2 MS. STEINGART: I don't know. I don't
3 know. Here we're not talking about the burden of a
4 third party. Here we're talking about somebody who is
5 a party to a case. This is the defendant. And to a
6 certain extent I think that we in our papers describe
7 the injury is self-inflicted. They have raised the
8 defense and now we need to see well, they have said
9 that we were released and the release sets us free.
10 Well, I don't think it sets them free if it was
11 obtained in a manner that was fraudulent.

12 SPECIAL DISCOVERY MASTER JAMES: And
13 that's what Judge Case has held?

14 MS. STEINGART: Right. So from our point
15 of view as to timing, relevance, scope and burden,
16 really those problems are in a sense, Your Honor, ours
17 because they have the stuff assembled, they have a
18 confidentiality agreement, they have sifted through
19 it. If they want an agreement as to inadvertent
20 waiver if they give us stuff, you know, we will give
21 them an agreement as to inadvertent waiver. And then
22 we have the burden of sifting through it and being
23 prepared to take depositions within the time that's
24 been allotted to us and we will do that.



1 SPECIAL DISCOVERY MASTER JAMES: How much
2 time -- we talked a little bit about this in the last
3 call.

4 How much time ideally would you want for
5 depositions?

6 MS. STEINGART: Well, I think we're going
7 to have between -- I think that we're allowed ten. I
8 think that the most we'll ask for beyond that is five.
9 So assuming for the moment that there be ten to
10 fifteen depositions, once we begin them I'm hoping
11 that most of them can be one day or less except for
12 maybe two or three of the principals. So I would
13 think that a day a week for two weeks and then maybe a
14 week thereafter if there are certain depositions that
15 need more than one day.

16 But I'm hoping that 90 percent of the
17 depositions can be done in one day or less.

18 SPECIAL DISCOVERY MASTER JAMES: Okay.
19 Anything else?

20 MS. STEINGART: I think that's it, Your
21 Honor. Thank you.

22 SPECIAL DISCOVERY MASTER JAMES:
23 Mr. Snellings, do you have anything to add?

24 MR. SNELLINGS: No, Your Honor.



1 SPECIAL DISCOVERY MASTER JAMES:

2 Mr. Pizzurro?

3 MR. PIZZURRO: Let me try to take the
4 issues in order as you stated them.

5 Timing, if we're talking about the
6 universe of documents, excluding the second document
7 request, which is what the scope and relevant issue I
8 believe is addressed to, but on the timing for the
9 other documents, we ought to be able and I'm confident
10 we will be able to complete production by the end of
11 February, at the latest the first week of March, which
12 would give the remainder of March and April for the
13 depositions that Ms. Steingart described.

14 SPECIAL DISCOVERY MASTER JAMES: This is
15 putting aside the second request?

16 MR. PIZZURRO: Exactly. Exactly. That
17 timing is going to be off considerably if NorthWestern
18 is compelled to produce certainly all the documents in
19 the -- I would point out that the scope of the second
20 set of requests is beyond simply what was produced to
21 the SEC. It's all of the deposition transcripts and
22 exhibits to depositions and every subpoena and
23 basically it goes on for the MPSC investigation, as
24 well as the SEC investigation, the DOJ. The McGreevey



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1 lawsuit is mentioned in there as well.

2 As we have pointed out or stated in our
3 response, there are no documents that would be
4 responsive to the requests that relate to the
5 McGreevey case other than, I guess, the request that
6 asked for all documents relevant to a claim the
7 McGreevey claim posited which is identical to the
8 claim here. So I think that's just redundant of
9 everything else, so I don't count that into any
10 calculus.

11 We have, I think it was in one of our
12 submissions, it's in the neighborhood of 1.1 million
13 documents which were produced to the SEC. And
14 notwithstanding Ms. Steingart's argument on privilege,
15 the citation of the Westinghouse case is misplaced.
16 The Westinghouse case was interpreting privilege under
17 New Jersey law. It's not binding on the Delaware
18 courts which uses Delaware state law on this issue.
19 And the Delaware decisions are at odds with the New
20 Jersey decisions, particularly if one produces
21 documents to a regulator such as the SEC with a
22 confidentiality agreement with the regulators and that
23 was the case here.

24 So it will require a substantial amount of



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1 review of that universe of documents in order to cull
2 privileged documents.

3 SPECIAL DISCOVERY MASTER JAMES: Speaking
4 of privilege, have you been producing a privilege log
5 on a going basis?

6 MR. PIZZURRO: We're preparing a privilege
7 log on a going basis. We haven't provided a privilege
8 log, which we will do when the production is complete.

9 SPECIAL DISCOVERY MASTER JAMES: Okay.

10 MR. PIZZURRO: To talk about relevance, as
11 we pointed out and as Your Honor started the
12 conference, you have to look to Rule 26. The request
13 has to be relevant to a claim or defense, which means
14 that one has to go back to the complaint. You have to
15 go back to the pleading because there isn't any other
16 place where one could find a claim or a defense.

17 As Fried, Frank, Ms. Steingart has put in
18 her papers very succinctly, their claim is a simple
19 fraudulent conveyance claim. Their claim is that
20 NorthWestern and Clark Fork engaged in a transaction
21 in which Clark Fork was stripped of its assets and
22 rendered insolvent and that Clark Fork, therefore, had
23 no one to look to to pay their obligations.

24 Judge Case took that claim and said in



1 order to have that claim, a sine qua non, an element
2 of the claim is that you're a creditor of Clark Fork.
3 He then went through a detailed analysis of all of the
4 transaction documents and all of the arguments that
5 had been raised on behalf of Magten and discounted
6 each and every one of those arguments and found that
7 the transaction released Clark Fork, not NorthWestern.
8 The red herring here is there's an affirmative defense
9 of a release or any affirmative defense at all. There
10 is none.

11 The release here is a release of Clark
12 Fork, which means that Magten is no longer a creditor
13 and Magten has no standing to assert the fraudulent
14 conveyance which it asserts. Judge Case said but you
15 have said that that release was induced by fraud and I
16 think that that's something that cannot be determined
17 on a motion to dismiss.

18 So the issue of the fraud is whether the
19 trustee was induced by reliance on the false
20 financials in releasing Clark Fork. After Judge
21 Case's decision, there was an amended complaint. The
22 reason I have to assume that there was an amended
23 complaint based on at least what Judge Case said,
24 because there was this PUCA claim that was put in



1 which really is not part of this case anymore, was to
2 include the allegation which is at paragraph 68 that,
3 in fact, the indenture trustee did rely on the false
4 financials in releasing or in executing the third
5 supplemental indenture which Judge Case held operated
6 as a release of Clark Fork. That was the allegation.

7 There's no allegation of an overarching
8 fraudulent scheme, and it's not just absent from the
9 second or from the first amended complaint. It's
10 nowhere. It is in no pleading in this case and,
11 indeed, it is in no legal argument in this case until
12 Your Honor asked for supplemental submissions. And
13 now a theory of this case which is brand-new has been
14 posited and the theory of the case is that there was
15 this fraudulent scheme and that but for the false
16 financials of NorthWestern which induced regulators to
17 approve which induced the indenture trustee to
18 release, but for that the transfer never would have
19 occurred and, so they argue, Magten would be a
20 creditor of Clark Fork.

21 But that doesn't answer the standing issue
22 because what that argument is is there was a fraud and
23 we're entitled to prove that fraud and as a result we
24 go back in time and we are creditors now, not of an



1 asset-stripped company so we can now assert a
2 fraudulent conveyance claim. We're a creditor of a
3 company that has the utility assets.

4 The injury, whatever that claim is, and
5 I'm not sure exactly what it is, but whatever that
6 claim is, not only is it not pled, the predicate for
7 the claim is not that Clark Fork has been injured
8 because it's a creditor -- or rather that Magten has
9 been injured because it's a creditor of Clark Fork.
10 The predicate for the claim is that Magten is injured
11 because they are a creditor of NorthWestern. That's
12 the entire claim.

13 Their claim is you engaged in a fraud, as
14 a result of which you, NorthWestern, took the assets
15 and you assumed our obligations; you weren't able to
16 pay our obligations, as a result of which we're now
17 sitting here as a subordinated creditor in a
18 bankruptcy proceeding and we're asserting that fraud.

19 That theory with the fraud on the
20 regulators and the entire scheme as set forth in the
21 papers for the first time on this supplemental
22 submission is nowhere in any complaint.

23 SPECIAL DISCOVERY MASTER JAMES: Let me
24 stop you there.



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1 Do you agree with that?

2 MS. STEINGART: No.

3 SPECIAL DISCOVERY MASTER JAMES: Explain.

4 MS. STEINGART: I don't agree with that
5 because, first of all, Judge Case did not find the
6 complaint to be inadequate. He did not say the
7 complaint can survive if this kind of claim can be
8 pleaded, go plead it and amend your complaint.

9 The complaint was amended indeed to act
10 the PUCA claim. That was the purpose of the
11 amendment, to which we had an immediate renewal of a
12 motion to dismiss which is still pending. And that
13 motion to dismiss nowhere said that the other claim,
14 the fraudulent conveyance claim still was flawed
15 because it did not allege a fraudulent scheme. It
16 nowhere said that somehow there's a failure to plead
17 fraud with particularity.

18 So the fraud that Judge Case very clearly
19 spoke of had to do with, one, whether the debtor knew
20 at the time it could not do the transaction based on
21 its restated earnings. That's what Judge Case said.
22 And, two, whether the financial information provided
23 by the debtor to the public was false. This was in
24 Judge Case's opinion from the get-go and it has always



1 been and is still the only issue in the case.

2 The other uses and the other fraudulent
3 activities really provides evidence of the wrongdoing
4 with respect to Clark Fork.

5 SPECIAL DISCOVERY MASTER JAMES: Let me
6 see if I understand this correctly.

7 Assuming that you're able to prove fraud
8 in the inducement, does that permit Magten to then go
9 against the assets of Clark Fork or, as Mr. Pizzurro
10 seems to be saying, it simply affects you somehow with
11 respect to your claims against NorthWestern?

12 MS. STEINGART: Well, it is a claim now
13 against NorthWestern because what would happen in the
14 normal fraudulent conveyance context is that if there
15 was a fraudulent conveyance and there was a
16 transferee, someone who had the assets --

17 SPECIAL DISCOVERY MASTER JAMES: In this
18 case NorthWestern.

19 MS. STEINGART: Right. Then you would
20 have a constructive trust. And what Judge Case said
21 is here we have a bankruptcy; the bankruptcy is
22 proceeding; you are a creditor in this class based on
23 your fraudulent conveyance claim so what you have now
24 instead of being able to freeze the transferee of the



1 assets, what you have is a class 9 claim.

2 So our fraudulent conveyance claim for the
3 assets from the transferee was changed to a fraudulent
4 conveyance claim as a class 9 claim for the amount
5 that NorthWestern paid those in the class. So the
6 class 9 claim is worth two-thirds of face value or
7 three-quarters of face value.

8 So what Mr. Pizzurro is saying is that if
9 we hadn't gone through bankruptcy, NorthWestern would
10 be the transferee and we would be able to get from the
11 transferee the damage or a constructive trust on those
12 assets.

13 Here that's not the case just because of
14 the bankruptcy process which has converted our claim
15 to this class 9 claim.

16 When Mr. Pizzurro talks about the circle,
17 he's sort of saying the bigger the fraud I commit, the
18 more you have no recourse; so if I fraudulently take
19 both the assets and the transferor's obligation to pay
20 you, then you have no claim at all. And that just
21 can't be the case. Judge Case said that life doesn't
22 work that way. The Montana judge very clearly when
23 Hanson and Kindt moved for dismissal of the complaint
24 said life doesn't work that way.



1 So we do have a claim and we have a claim
2 against the transferee for the excess value to the
3 extent of our QUIPS.

4 SPECIAL DISCOVERY MASTER JAMES: Thank you
5 for that clarification.

6 MR. PIZZURRO: First of all, my argument
7 or an explication of what I think is actually being
8 argued here by Magten has nothing to do with -- what
9 Ms. Steingart was talking about was remedy. I'm not
10 talking about remedy. I'm talking about a claim as
11 pled.

12 They have claimed in their complaint and
13 in the amended complaint that this was a fraudulent
14 transfer because Clark Fork gave up its assets for
15 insufficient consideration. It was thereby rendered
16 insolvent to the detriment of Magten. Obviously if
17 Magten is not a creditor of Clark Fork, then the
18 solvency or insolvency of Clark Fork is completely
19 irrelevant.

20 And when they argue that all of these
21 documents and when they argue this theory of fraud on
22 the regulators and that this transaction never would
23 have been able to have been accomplished but for that
24 fraud, they're not talking about a fraudulent



1 conveyance claim and an asset-stripped shell that they
2 must look to.

3 What they're talking about is a situation
4 in which their complaint is NorthWestern assumed the
5 obligation. That's their complaint. Their complaint
6 is that the obligor now turned out to be NorthWestern.
7 They want a world in which Clark Fork has the utility
8 assets throwing off sufficient income to be able to
9 pay off its debts, including the QUIPS, and that that
10 is the universe that had continued.

11 It didn't continue and their damage as.
12 they really are articulating this claim now is because
13 they aren't creditors of Clark Fork; it's because
14 they're creditors of NorthWestern. Now, that's not
15 the claim that Judge Case upheld. It's not the claim
16 that's pled.

17 And the problem I have here -- and it's a
18 significant one because this goes well beyond simply
19 an issue of discovery. I don't know what I'm
20 defending anymore. I've got a complaint that says
21 it's a simple fraudulent conveyance and, indeed, if we
22 read the very beginning of the first supplemental
23 submission on behalf of Magten, that's what Magten
24 says: It's a simple fraudulent conveyance and we are



1 injured as a result of the insolvency of Clark Fork.

2 SPECIAL DISCOVERY MASTER JAMES: Can we
3 look at the amended complaint or the complaint?
4 Because I want to walk through this so I understand.
5 I think it's an exhibit to something.

6 MR. PIZZURRO: Yes. We submitted the
7 original complaint is Exhibit A to our supplemental,
8 NorthWestern's supplemental submission.

9 MR. BREWER: It's Exhibit C to your
10 supplement.

11 (Discussion off the record.)

12 SPECIAL DISCOVERY MASTER JAMES: Which
13 paragraphs are we focusing on?

14 MR. SNELLINGS: Are you looking at the
15 original complaint or the first --

16 MR. PIZZURRO: We're looking at the
17 original complaint, which I think is what you wanted
18 to look at.

19 MS. STEINGART: I think the special master
20 asked for us to look at the amended complaint.

21 MR. PIZZURRO: You want to look at the
22 amended complaint?

23 SPECIAL DISCOVERY MASTER JAMES: Does it
24 make any difference?



1 MS. STEINGART: Paragraph 68 with respect
2 to that is the only thing that changed where paragraph
3 68 talks about the fraudulent inducement of the
4 trustee.

5 SPECIAL DISCOVERY MASTER JAMES: Well,
6 then, I think we should look at the amended complaint.

7 Is that part of the record?

8 MR. PIZZURRO: Yes.

9 MS. STEINGART: Yes, it is.

10 MR. PIZZURRO: That's Exhibit C to our
11 submission.

12 SPECIAL DISCOVERY MASTER JAMES: Okay.
13 All right. Go ahead.

14 Walk me through your explanation as to why
15 the discovery they're seeking does not fit within the
16 ambit of what they have pled.

17 MR. PIZZURRO: What they have pled is a
18 classic fraudulent conveyance claim which is that
19 NorthWestern had its subsidiary, Clark Fork, transfer
20 assets in exchange for insufficient consideration,
21 which was the assumption of liabilities. As a result
22 of the transaction, Clark Fork was rendered insolvent
23 and they, Magten, have been injured.

24 SPECIAL DISCOVERY MASTER JAMES: And



1 that's the second cause of action?

2 MR. PIZZURRO: That's the second cause of
3 action. And then it's repeated. They use two
4 different provisions of the Uniform Fraudulent
5 Conveyance Act, but that's essentially 2 and 3, claims
6 2 and 3.

7 SPECIAL DISCOVERY MASTER JAMES: The third
8 cause of action?

9 MR. PIZZURRO: Yes. Claims 2 and 3.

10 SPECIAL DISCOVERY MASTER JAMES: What
11 about 4?

12 MR. PIZZURRO: Well, 4 is -- what's 4?

13 SPECIAL DISCOVERY MASTER JAMES: That's
14 Clark Fork. Okay.

15 MR. PIZZURRO: Rendered Clark Fork
16 undercapitalized.

17 So the predicate for that claim of course
18 is, and this is just to go back to what Judge Case was
19 talking about, the predicate for the claim is you had
20 to have been a creditor of Clark Fork. In the classic
21 situation what would have occurred would have been
22 that NorthWestern would have taken the assets and left
23 the liabilities rather than assuming the liabilities,
24 left those liabilities with the sub so that now the



1 creditors, such as the QUIPS holders, are looking to
2 an entity which is severely undercapitalized, rendered
3 insolvent, it can't pay them off and they're entitled
4 to relief and that's what they claimed.

5 And of course Judge Case said why are you
6 here claiming that? You are now creditors of
7 NorthWestern. The only way that you can have this
8 claim is if you can show that the release of Clark
9 Fork on the indebtedness was obtained by fraud because
10 any contract is vitiated by fraud.

11 SPECIAL DISCOVERY MASTER JAMES: Right.

12 MR. PIZZURRO: And the language that
13 Ms. Steingart cites was stated by the judge in the
14 context of that analysis. Fraud does not exist in the
15 air. I don't have a claim for fraud against
16 NorthWestern and no one else in the public has a claim
17 against NorthWestern based on the fact that it might
18 have been publishing false financials unless, of
19 course, you purchased a security or you engaged in
20 some transaction with them. But the fact that there's
21 false financials in the air doesn't mean anything.

22 SPECIAL DISCOVERY MASTER JAMES: As I
23 understand her position, Magten's position, the fraud
24 in the inducement theory if she can support it or if



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1 Magten can support it then puts them in a better
2 position within the bankruptcy context than they would
3 otherwise have been and that is pled in the amended
4 complaint in her view and is the thrust of Judge
5 Case's decision.

6 MR. PIZZURRO: With all due respect,
7 that's not the thrust of Judge Case's decision. The
8 thrust of Judge Case's decision has nothing to do with
9 the ultimate result of the merits of their claim or
10 the remedy to which they are entitled because Judge
11 Case went through an entire analysis where he threw
12 them out. He said you don't have a claim here. The
13 only way that you can begin to get to the point where
14 we can discuss the issues you just articulated is
15 whether you have status today as creditor of Clark
16 Fork. Not that you're a disappointed creditor of
17 NorthWestern. Not that you are subordinated to other
18 senior unsecured debt of NorthWestern. They didn't
19 have a contract right to avoid that. They had
20 essentially little, if any, rights as an unsecured
21 creditor.

22 And the QUIPS by their terms, there could
23 be subsequent senior borrowings, there could be
24 securitization of assets, there could be a suspension



1 of payments on the interest for up to 60 consecutive
2 months. They don't have a claim based on the fact
3 that they ended up at the bottom of the heap of a
4 group of senior unsecured or even secured creditors.

5 SPECIAL DISCOVERY MASTER JAMES: Why not?

6 MR. PIZZURRO: Because their contract does
7 not give them that protection. They can't get any
8 more protection from the law than their contract gives
9 them.

10 In other words, posit a situation, if you
11 will, where Clark Fork secured all of these assets and
12 Clark Fork borrowed a billion dollars or just make up
13 whatever numbers you want, and then rendering itself
14 insolvent as a result of being overleveraged
15 hypothetically. There's no claim that these
16 securities holders would have.

17 SPECIAL DISCOVERY MASTER JAMES: So what
18 is your understanding then if Magten proves fraudulent
19 inducement, then what is the remedy that they will
20 have?

21 MR. PIZZURRO: The remedy as I understand
22 it, because we are in a bankruptcy context and the
23 debtor has emerged and the plan has been confirmed, is
24 that they will be able to collect on their claim, as



1 Ms. Steingart explained, and recover from the disputed
2 claims reserve based on the plan value of stock at the
3 68 percent and change, whatever the number is. So I
4 mean there's a formula for coming to whatever the
5 dollar amount would be, which essentially would be
6 payment in full of what they have claimed as principal
7 and accrued interest I guess up until the time of the
8 bankruptcy filing, but I don't want to quibble about
9 the number.

10 But that's essentially the remedy to which
11 they are entitled. But that is a remedy to which they
12 are entitled only if they can show that that release
13 that they are not creditors, didn't become creditors
14 of NorthWestern. The theory that we're seeing in
15 these papers and the problem that this presents for
16 NorthWestern is that now we have a completely
17 different theory where the injury is an injury to them
18 as a result of being the creditors of a company which
19 they claim was insolvent at the time of the
20 transfer -- by the way, Judge Case said there was no
21 guarantee of solvency, so that's not the basis for
22 anything -- and a company where they ended up at the
23 bottom of the heap of unsecured creditors and the
24 company ultimately went into bankruptcy. And that's



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1 essentially the injury that they are claiming based on
2 the theory that we now see in these papers, the theory
3 of fraud on the regulators, this theory that somebody
4 would have prevented this transfer from occurring and
5 we would have been saved from the predicament of being
6 a creditor of NorthWestern.

7 That doesn't solve their standing problem
8 and that's a completely different claim. If they want
9 to plead that claim, I mean that's a different story.

10 I think something that Ms. Steingart said
11 this afternoon highlights the difficulty that this
12 creates for NorthWestern. She is now talking about
13 the relevance of her discovery requests in terms of
14 evidence of intent and scienter, not in terms of the
15 overarching fraudulent scheme which showed up in these
16 papers for the first time but now in terms of fraud on
17 the indenture trustee.

18 So in the space of what is less than a
19 month, indeed less than, it's only two weeks, we now
20 have three separate theories to support these
21 discovery requests. And I don't understand how those
22 requests can be substantiated in light of the
23 requirement of Rule 26(b) that they be relevant to a
24 claim or a defense. There has got to be a claim here



1 and there is no claim of fraud on the regulators.
2 There is no claim that this transaction would never
3 have been able to occur because somebody would have
4 stopped it and, therefore, we're entitled to see all
5 of this. Their claim is fraud on the indenture
6 trustee.

7 Now, as I said at the last meeting and we
8 have it in the papers, we're willing to give a
9 stipulation. Now, the precise wording of the
10 stipulation would be subject obviously to negotiation,
11 but we would be willing to give a stipulation that
12 would take out of this case the issue of the false
13 financials and now if Magten would focus on the
14 remaining issue -- which is how did you use those?
15 Were they something that the company did use in order
16 to effectuate the release? Was it something that was
17 presented to the indenture trustee? Was it something
18 that would have mattered to the indenture trustee?
19 How were these things used?

20 A fraud requires not simply a material
21 misstatement. We can get by the material
22 misstatement. It requires reliance and that's
23 essentially what we think this case ought to be
24 focused on, if we give that stip. Now, I understand



1 this was precisely what was in front of Judge Farnan
2 when we asked for a protective order, but we weren't
3 prepared to give the stip. at the time even though at
4 that time we were invited by Magten to do it. They
5 said since you won't stip. to these issues, and Judge
6 Farnan agreed, there's more at stake here than simply
7 whether or not the indenture trustee relied.

8 Well, I think we can work out a stip. and
9 I think that we can avoid the millions of pages of
10 documents that would have to be reviewed and then
11 turned over and the burden that's going to put -- I
12 know they're not complaining about it, but the burden
13 that would be put on plaintiffs' counsel, as well as
14 the substantial burden that would be put on
15 NorthWestern.

16 SPECIAL DISCOVERY MASTER JAMES: Let's
17 look at the Judge Case decision, page 9 where he talks
18 about was there a fraudulent scheme?

19 Does everybody have it?

20 MS. STEINGART: Yes.

21 MR. SNELLINGS: Yes.

22 SPECIAL DISCOVERY MASTER JAMES: In the
23 penultimate paragraph Judge Case says, "Critical to
24 Debtor's position," which is NorthWestern, "is that



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1 the release of Clark Fork under Section 1102 was
2 effective, thereby removing Plaintiffs as creditors of
3 Clark Fork. However, if Plaintiffs can prove (as they
4 have alleged) that the release was obtained through
5 fraud, then the release would be ineffective."

6 Then he cites Williston: "If action is
7 taken for a fraudulent purpose or to carry out a
8 fraudulent purpose or to carry out a fraudulent
9 scheme, the action is void and of no force or effect."

10 On the next page, page 10, it says, "If a
11 release is obtained by fraud, it is unenforceable
12 under Montana law" in the middle of that first
13 paragraph and citing various authorities.

14 Then it says, "Debtor directly challenges
15 Plaintiffs' fraud argument, contending that this case
16 must be dismissed because there simply was no fraud.
17 Debtor hangs its hat on the fact that numerous
18 transactions making up to the transfer were disclosed
19 to both regulatory filings and in documents executed
20 by the Trustee. According to Debtor, the terms of the
21 deals were known to all and, therefore, by definition
22 mean there was in fact no fraudulent intent on
23 Debtor's part.

24 "While Debtor's disclosure may be one



1 factor in favor of finding no fraudulent intent on
2 Debtor's part, it is far from conclusive at the motion
3 to dismiss stage. Debtor may have disclosed the nuts
4 and bolts of the transfers, but Plaintiffs'
5 allegations go beyond simply that the actual transfer
6 itself was fraudulent in its terms. As alleged, the
7 questions are whether Debtor knew at the time that it
8 could not do the transaction based on its restated
9 accountings, etc. and whether the financial
10 information Debtor provided the public was in fact
11 false. These are fact questions not appropriately
12 resolved on a motion to dismiss."

13 Now, my reading of that last paragraph,
14 and I would like you to respond to this, seems to go
15 well beyond what you are articulating as the scope of
16 discovery. What's confusing to me, however, is that
17 as you seem to indicate Judge Case left up in the
18 air -- well, no.

19 Then looking to the last page, it says,
20 "The Plaintiffs lack standing as creditors of Clark
21 Fork to pursue a fraudulent conveyance action against
22 the Debtor because of the Section 1102 release, unless
23 they can prove under applicable law that the Section
24 1102 release was obtained through actual fraud or as



1 part of a fraudulent scheme."

2 So I just don't understand your argument
3 respectfully, Mr. Pizzurro, that that doesn't say
4 exactly what Magten is arguing here today and
5 supporting its right to obtain at least part of the
6 discovery that they're seeking. Tell me what I'm
7 missing.

8 MR. PIZZURRO: Okay.

9 SPECIAL DISCOVERY MASTER JAMES: First
10 let's take a break.

11 (A brief recess was taken.)

12 MR. PIZZURRO: I think it's very clear
13 when you look and it's particularly clear when you
14 look at the conclusion that you pointed to, Your
15 Honor. What the judge said here is that this claim is
16 dismissed unless the release is obtained through
17 actual fraud or part of a fraudulent scheme. Now, I
18 want to be clear about something here.

19 Although Judge Case alternately in his
20 opinion refers to Magten's position as arguments and
21 as allegations, there are no allegations anywhere in
22 the initial complaint that support this theory. This
23 theory was a theory which was posited on argument for
24 the motion to dismiss.



1 So that's why there may have been other
2 reasons, but clearly a reason for Magten to have
3 amended its complaint was to pick up on this holding
4 by the judge. Rule 26 doesn't talk about what judge's
5 opinions may or may not say. Rule 26 talks about
6 claims or defenses. And had Magten not amended the
7 complaint and had not asserted or included any
8 allegation whatsoever to support the opportunity here
9 to show standing, I think one could be confident that
10 NorthWestern would have moved again and had a
11 dismissal.

12 But they did amend the complaint and they
13 amended the complaint in this respect solely, as
14 Ms. Steingart said earlier today and as we pointed
15 out, solely in paragraph 68 of the amended complaint.
16 Paragraph 68 of the amended complaint is the only
17 place where any fraud in connection with the third
18 supplemental indenture, which is the Section 1102
19 release, is pled. That's it. It's only there. So
20 there isn't, there isn't this pleading of a fraudulent
21 scheme or any of the other things that we have heard
22 about in the supplemental submissions.

23 Now, we had pointed out in response to the
24 argument that was made by Magten that this Rule 9(b)



1 requires that they plead this with particularity.
2 This is the particularity with which they pled it.
3 And the purpose of Rule 9(b) -- I'm not talking about
4 moving against us for failure to plead it with
5 particularity. I'm talking about being bound to your
6 allegations so that the defendant knows what
7 wrongdoing he's being accused of. And we can't
8 constantly have a moving target which is amending the
9 claim, the whole theory of the case in order to
10 justify overarching discovery requests.

11 Whether or not the financials were false
12 is an issue. How those financials were used in
13 connection with obtaining the Section 1102 release is
14 relevant. The knowledge and intent on the part of
15 NorthWestern is relevant. The reliance, if any, by
16 the trustee is relevant. All those issues are
17 relevant. I'm not arguing that.

18 But everything that was turned over to the
19 SEC, everything that was turned over to the Montana
20 Public Service Commission, everything that was turned
21 over to the Justice Department? None of those things
22 are relevant as those kinds of broad brush requests.
23 We can narrow this case. We can get the veracity of
24 the financials, if you will, out of this case and then



1 we can focus on this fraud if they can prove it. Were
2 the financials something which were, first of all,
3 falsified in order to obtain the release? Were the
4 financials, in fact, intentionally used by
5 NorthWestern in order to do the going flat
6 transaction? Was the indenture trustee presented with
7 the financials in executing the release? Was there
8 reliance? These kinds of issues. That's not a
9 million documents. It's not even 200,000 that have
10 already been produced.

11 That's a pretty discrete lawsuit which you
12 could probably do your discovery easily within the
13 time allotted and you could probably try that one in
14 three or four days. But it's not what we have now on
15 the table.

16 SPECIAL DISCOVERY MASTER JAMES: Have you
17 produced documents responsive to your articulation of
18 what your understanding is of paragraph 69?

19 MR. PIZZURRO: Yes. That's what we are
20 doing, and we have gone broader than that.

21 SPECIAL DISCOVERY MASTER JAMES: You're in
22 the process of doing that?

23 MR. PIZZURRO: That's what we're in the
24 process of doing, but we have gone broader than that.



1 We have gone broader than that.

2 SPECIAL DISCOVERY MASTER JAMES: Some of
3 those include documents provided to the SEC?

4 MR. PIZZURRO: That's correct.

5 SPECIAL DISCOVERY MASTER JAMES: For my
6 information, because I don't think it's really
7 explained in the papers that have been given to me,
8 and I don't care who explains this to me, but since
9 you have got the podium now, what is the nature of
10 each of these investigations against NorthWestern?
11 That's your client.

12 So what's the nature of the SEC
13 investigation? What are they looking for? Why in
14 your view does what they're looking for extend way
15 beyond what is at issue here?

16 MR. PIZZURRO: What the SEC is looking at
17 is the financial reporting with respect to two
18 non-utility business investments that had been made by
19 NorthWestern. There's Blue Dot and there's Expanets.

20 And as I understand it, and I'm not, as I
21 pointed out, counsel in the SEC investigation, but the
22 investigation is of certain failure to report expense
23 items in connection with those investments,
24 overstating income resulting from those investments,



1 failure to make available to the public certain
2 substantial, certain substantial financial drain that
3 those investments made on NorthWestern so that when
4 NorthWestern filed its 10-K in April of 2003, it
5 restated its first three quarter Q's for 2002 and that
6 is what was resulted in the 800 plus billion -- or
7 million rather difference in the numbers.

8 And it was as a result of that that the
9 SEC commenced the investigation and has been
10 continuing with that investigation, but the focus of
11 the SEC has been on the Expanets and Blue Dot. There
12 might be a couple of other minor transactions or
13 investments that are also at issue for the SEC.

14 SPECIAL DISCOVERY MASTER JAMES: Let me
15 stop you there because as I understood this
16 transaction, that was the whole problem that led to
17 the bankruptcy. And in demonstrating fraud in the
18 inducement I would think as Magten that I would want
19 to know a lot about the representations made to the
20 debenture trustee, the internal thinking about how to
21 account for the profits and loss of these non-utility
22 assets because they were releasing their right to
23 these utility assets which were pretty stable.

24 MR. PIZZURRO: Let me correct that,



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1 please.

2 SPECIAL DISCOVERY MASTER JAMES: Okay.

3 MR. PIZZURRO: The QUIPS had no right in
4 any respect --

5 SPECIAL DISCOVERY MASTER JAMES: The
6 trustee did.

7 MR. PIZZURRO: The trustee had none
8 either. That argument has been made on a couple of
9 occasions to the Bankruptcy Court and the Bankruptcy
10 Court has rejected it. There's no relationship
11 between the QUIPS and the assets.

12 The QUIPS holders had no right to have the
13 assets held by their obligor. They were completely
14 unsecured. This was rejected when they tried to
15 impose the constructive trust and the Court has said
16 no, you're unsecured creditors; you have absolutely no
17 rights in these assets.

18 And there was nothing in what the
19 indenture trustee was required to do or in the
20 transaction of assumption, if you will, which related
21 specifically to any rights that the QUIPS holders had
22 in these assets.

23 SPECIAL DISCOVERY MASTER JAMES: Okay.
24 Let me hear from you on that.



1 MS. STEINGART: All right. It's hard to
2 know where to begin, but I'm going to begin with the
3 complaint or the amended complaint. And there's a
4 threshold issue that I think is important to explain
5 and I really don't know if Mr. Pizzurro appreciates
6 this issue when he described what the nature of the
7 claim is. But I would like to direct your attention,
8 if I might, to paragraph 48 of the amended complaint
9 because what paragraph 48 of the amended complaint
10 says is it talks about how the debtor entered into the
11 second supplemental indenture pursuant to which the
12 debtor assumed all the obligations under the indenture
13 on a joint and several basis.

14 So it's important to understand that
15 NorthWestern took the assets and the liabilities, but
16 Clark Fork, but for the release, remained a
17 co-obligor. The transfer of the assets and
18 liabilities from Clark Fork to NorthWestern did not
19 remove Clark Fork as an entity that was responsible
20 for paying the QUIPS. So when that transaction
21 occurred, both NorthWestern and Clark Fork were liable
22 for payment on the QUIPS. All right?

23 So we have a situation that we're still
24 creditors of Clark Fork. And the thing that made us



1 not a creditor of Clark Fork as well as NorthWestern
2 was the release. So if the release is reversed, the
3 assets don't have to go back. We are creditors of
4 Clark Fork with standing to assert the fraudulent
5 conveyance, and that is precisely what Judge Case
6 understood in this last page of his opinion. That's
7 what this sentence was all about. And that's in our
8 complaint.

9 What's also in our complaint is the SEC
10 investigation. Paragraph 61, "Immediately thereafter
11 the SEC launched an informal investigation into
12 debtor's financial statements. The truth or falsity
13 or knowing falsity of NorthWestern's public financial
14 statements have been at the heart of this issue from
15 the get-go."

16 And in addition to stating a claim not
17 only for fraudulent conveyance, which we have standing
18 to sue if that release is found to be ineffective, we
19 also state a claim for unjust enrichment. And there's
20 nothing that's been said here today which undercuts
21 that claim no matter who is an obligor.

22 SPECIAL DISCOVERY MASTER JAMES: How does
23 that work in bankruptcy?

24 MS. STEINGART: Well, it is, as



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1 Mr. Pizzurro says, if we could have obtained a
2 constructive trust of the assets, we would have been
3 secured. Not having a constructive trust, we have a
4 claim against the transferee, which is NorthWestern,
5 which is your general unsecured claim. And we have
6 been put in a class and what class we're in and the
7 percentage recovery we get is not really the issue.
8 The issue here is was there a fraudulent conveyance
9 and do we have a claim? And I think all of the
10 elements of that claim are here.

11 NorthWestern puts us in a difficult
12 situation because I don't like to cast aspersions on
13 an adversary. We each have our job to do. But as you
14 can see from Judge Case's opinion on page 10, a
15 portion Your Honor that you read from, the debtor
16 directly challenged our argument by lauding, by
17 complimenting, by pointing out the representations
18 that it made to regulators and others. It said look
19 at what we told them; look at what we did.

20 Mr. Pizzurro has just told you that the
21 falsity of NorthWestern's financials and the places
22 that those financials were used to obtain benefits and
23 results unjustly is the heart of what the SEC is
24 looking at. It's the heart of what the DOJ is looking



1 at. We are looking at the same financials. It's not
2 as if the SEC is looking at financials for some other
3 period and I'm saying well, what they did five years
4 ago matters now because it shows that they have a
5 pattern. We're looking at the very same misstated
6 financials, both we and the SEC and the DOJ.

7 And when we have NorthWestern saying well,
8 you have to show that we made these false so that we
9 could induce your trustee. I'm saying poppycock, you
10 made these false so you could induce everybody and, in
11 fact, you did, so don't tell me how great you were
12 because you used these same financials with
13 regulators, because they were untrue when you used
14 them with the regulators too and they're untrue here.

15 So I think that the complaint clearly sets
16 forth that but for the release, the 1102 release, the
17 QUIPS would be creditors of Clark Fork and that we
18 would have standing to bring this fraudulent
19 conveyance suit against NorthWestern even though
20 NorthWestern was obligated to pay the QUIPS as well.
21 NorthWestern and Clark Fork were co-obligors but for
22 the release. And Judge Case knew that.

23 And the use of these financials that were
24 admittedly false, that were materially false in each



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1 of these settings at the same period of time is
2 relevant to finding fraud in their use with the
3 trustee.

4 MR. SNELLINGS: Your Honor, if I could
5 also just add to that?

6 SPECIAL DISCOVERY MASTER JAMES: Yes.

7 MR. SNELLINGS: I mean, this argument that
8 this case can be narrowed to the reliance of Bank of
9 New York, which was the predecessor indenture trustee
10 in this case at the time of the going flat
11 transaction, has already been argued before Judge
12 Farnan. He already decided at page 4 of his opinion
13 that the plaintiffs' standing to sue NorthWestern on
14 whether The Bank of New York relied on NorthWestern's
15 financial statements was not what Case found. Case
16 noted that the essence of plaintiffs' fraud argument
17 was that NorthWestern engaged in a knowing and
18 conscious fraudulent scheme.

19 So he's already rejected this sort of
20 narrow reading, Judge Farnan has, of Judge Case's
21 decision and basically said that it shouldn't be
22 limited just to what the indenture trustee knew at the
23 time in which the transaction went forward. So it's
24 sort of rearguing something that I think we already



1 won.

2 MR. PIZZURRO: Let me just respond to
3 that.

4 SPECIAL DISCOVERY MASTER JAMES:
5 Certainly.

6 MR. PIZZURRO: There were a couple of
7 things that Ms. Steingart said. First of all, we're
8 not rearguing what we argued to Judge Farnan because,
9 as I said, and I made it very clear before, when we
10 moved for a protective order to Judge Farnan, we
11 argued that the only thing that was relevant initially
12 is the reliance by the indenture trustee. We have
13 very good reason to believe based on positions that
14 Bank of New York has taken in litigation with Magten
15 that there was no such reliance. But what we argued
16 was let's hold off on all this massive discovery, Your
17 Honor, examine this narrow issue because if The Bank
18 of New York says that we didn't care and wouldn't have
19 cared, then the fraud issue would go away.

20 And Judge Farnan disagreed with that, but
21 that's not what we're arguing here. We're not arguing
22 here that these issues that Judge Farnan said were
23 relevant are irrelevant. What we're offering to do is
24 to work out a stipulation which would take those



1 issues that Judge Farnan did focus on in addition to
2 the reliance issue, take those out of the case. And
3 there may be some other issues as Judge Farnan pointed
4 out.

5 So once the falseness of the financials
6 and the knowledge of NorthWestern is out of the case,
7 then let's focus on how they were used, if they were
8 used, in connection with inducing the execution of the
9 third supplemental indenture. But that is the case.
10 Ms. Steingart points to paragraphs in the amended
11 complaint, I mean there's no issue in August of '02
12 that there was joint and several liability between
13 Clark Fork and NorthWestern on the QUIPS. That went
14 away in November when there was the third supplemental
15 indenture and the release. But that's irrelevant to
16 the issue of whether that release is effective.
17 That's the issue: Was that release effective because
18 it was induced by fraud?

19 And the misrepresentation elements at
20 least in terms of the financials, we can get that out
21 of the case. But why is it relevant as to what the
22 SEC was concerned about in terms of Expanets? We have
23 agreed that we would produce, and we didn't object to
24 producing in the first set of document requests,



1 documents produced to regulators that concern the
2 going flat transaction. I understand that point. And
3 we have said fine, in part, large part because of the
4 fact that there isn't going to be anything there that
5 is going -- you know, that is beneficial to us. But
6 we're happy to do that. That's not what they're
7 asking for here.

8 They're asking for a range of documents
9 that has nothing whatsoever to do with this
10 transaction.

11 SPECIAL DISCOVERY MASTER JAMES: Give me a
12 for example.

13 MR. PIZZURRO: A for example? If you have
14 documents that are produced to the SEC that deal with
15 the financial drain that may have been put on
16 NorthWestern in the first or second quarter of 2002
17 and the fact that that was not accurately reported in
18 the Q's at the time, as long as the issue of the fact
19 that those Q's were wrong, what difference does it
20 make as to the underlying investigation? Unless of
21 course -- now, if they want to ask for documents that
22 the SEC was looking at or asking for in connection
23 with the going flat transaction, they have never asked
24 that question. I don't have a problem with that. I



1 really don't have a problem with that, but they refuse
2 to focus on this narrow fraud that they have alleged
3 and have expanded this into an enormous, you know,
4 this fraudulent scheme.

5 And really the whole basis and
6 justification for it is the use by Judge Case of the
7 phrase fraudulent scheme. Now, I don't know what
8 Judge Case was thinking about. I can't. He doesn't
9 describe the fraudulent scheme. So if I need to find
10 out what fraudulent scheme I'm defending against, I
11 guess I have to go to the complaint. There really
12 isn't anyplace else for me to go and there isn't
13 anything in there. There's nothing in there.

14 SPECIAL DISCOVERY MASTER JAMES: The
15 problem that I'm struggling with and that I have to
16 resolve as part of the pending motion and it's very
17 difficult is to determine, A, what has been produced
18 in the DOJ action, the SEC action, the state actions,
19 et cetera, number one. I think I have a general idea
20 from what you have told me about that.

21 Number two, and I don't see any other way
22 of avoiding this, I think we have to go through the
23 document requests and find out from Magten what
24 exactly it wants and whether, in fact, you're going to



1 produce it or already have produced it because it
2 sounds like you have been producing things that
3 overlaps with the SEC activities. I don't know
4 whether you produced anything that overlaps with the
5 Montana actions or not and I'm not sure whether we
6 even need that, just thinking out loud.

7 But let's take a look at the first and
8 second request for production.

9 MS. STEINGART: May I just respond to
10 something very briefly?

11 SPECIAL DISCOVERY MASTER JAMES: Sure.

12 MS. STEINGART: I don't want us to lose
13 sight of the fact that it's the financials of
14 NorthWestern that were false. That's the issue. When
15 NorthWestern keeps talking about well, it's about the
16 going flat transactions, it's about the going flat
17 transaction, I know what the assets and liabilities of
18 Clark Fork were. I know what Clark Fork's financial
19 condition was.

20 It was the fact that NorthWestern as a
21 company issued and used false financials in a variety
22 of contexts and the way in which they're false and the
23 way in which they were used will show the fraud. I
24 mean, this is the first time I've seen someone who's



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1 an admitted wrongdoer -- and I don't mean wrongdoer in
2 any sort of eternal damnation sense, but an admitted
3 wrongdoer telling me that I should have the documents
4 that show the wrongdoing, that I have to somehow in
5 advance stipulate to a state of mind when I can have
6 documents that will help to show that this was sort of
7 a general effort and that the trustee of the QUIPS was
8 just one of a dozen entities that were meant to be
9 drawn in to the fraud.

10 If NorthWestern is willing to say that
11 they had materially false financials, that it was
12 intentionally false, that they knew it was false, let
13 them just settle. I mean, why are we fighting about
14 this? The money is in a reserve. The claim is
15 capped. You know, we're not talking about punitives
16 here. I mean, why are we fighting? Why do I have to
17 look at a million documents if you're telling me
18 they're false? But how can I not look at them and be
19 able to establish the kind of falsity and the kind of
20 intent that was going on everywhere if I'm going to
21 have to litigate it?

22 So we're sort of in a catch 22 here. If
23 you want to make a clean break, make a clean break of
24 it, but don't make me sort of parse what I need and



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1 what I don't need when you have admitted that both the
2 DOJ and the SEC are looking at the publicly false
3 financials that were used during this entire period
4 with the trustee and others.

5 MR. PIZZURRO: Well, look, the fact that,
6 and I pointed this out earlier on and it is
7 fundamental to our argument, the fact that there were
8 false financials -- and you can't deny it. They were
9 restated, right. I'm not admitting anything. The
10 financials that were extant in 2002 were inaccurate.
11 They were wrong and they were restated. That does not
12 a fraud case for Magten make.

13 So on that stipulation, let's settle the
14 case, that's exactly my point. Let's take that issue,
15 let's put it here (indicating). Now let's focus on
16 all of the other elements that need to be proven
17 because under Ms. Steingart's theory the guy who
18 turned on the lights, the power company, has a fraud
19 claim. The person who is delivering paper products
20 has a fraud claim.

21 If there's fraudulent financial statements
22 out there, now it's just a question of what my damages
23 are. That's not, as we all know, what a fraud claim
24 is.



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1 SPECIAL DISCOVERY MASTER JAMES: What
2 she's saying as I understand it is that -- I don't
3 think you disagree with this -- based on Judge Case's
4 decision she has to show that there was the intent to
5 defraud by NorthWestern.

6 MR. PIZZURRO: Defraud who?

7 SPECIAL DISCOVERY MASTER JAMES: Defraud
8 the indenture trustee.

9 MR. PIZZURRO: Exactly..

10 SPECIAL DISCOVERY MASTER JAMES: And to do
11 that I believe that the plaintiff is entitled to
12 obtain certain documents within a reasonable scope
13 given the time constraints that we have in this case
14 to prove that portion of Magten's case.

15 So what we need to do now is to go through
16 the discovery requests and this is going to be tedious
17 and boring but necessary and that's why they have
18 special masters, because we do these tedious, boring,
19 necessary things, and see if we are on the same page
20 or not as to what the plaintiff seeks, whether
21 NorthWestern opposes it or whether NorthWestern has
22 indeed or will be producing documents responsive to
23 it. And then I'll have to make a decision as to the
24 magnitude of what's going to be produced, whether it's



1 relevant and to the extent that I order something
2 produced, that will affect the timing on which it has
3 to be done.

4 Now, one threshold issue is Magten has
5 argued that they really didn't need to file the second
6 request for production of documents because everything
7 in this second request was the subject of certain of
8 the requests in their initial production. And looking
9 at their initial request for production I should say,
10 which is Exhibit A to their original submission, from
11 my reading of this -- and, Ms. Steingart, please
12 correct me if I'm mistaken -- request numbers 14, 15,
13 16, 18, 19, 20, 21, 24, 25 request the type of
14 information that you have spelled out in greater
15 detail in the second request for production of
16 documents.

17 MS. STEINGART: Right. The only one that
18 I would add, Your Honor, is number 13, which requests
19 all applications or other documents submitted to
20 regulatory authorities in connection with the
21 transfer.

22 SPECIAL DISCOVERY MASTER JAMES: All
23 right.

24 Mr. Pizzurro, what is your position with



1 respect to what NorthWestern has produced, intends to
2 produce or will not produce with respect to those
3 requests that I have just identified?

4 MR. PIZZURRO: With respect to number 13,
5 we are producing documents, that is, applications
6 and/or documents submitted to regulatory authorities
7 in connection with the transfer.

8 My response to number 14 is we will
9 produce. We have a caveat on that, which is we have
10 an objection to anything that goes back in time I
11 believe before 2002. So to the extent it goes back to
12 2001, we have a standing objection which has not been
13 challenged.

14 SPECIAL DISCOVERY MASTER JAMES: Okay. Is
15 that accurate, Ms. Steingart?

16 MS. STEINGART: Well, I think to the
17 extent that 2001 is evidence of what needs to be
18 reported in 2002, I mean 2002 encompasses some of the
19 material from 2001 so I don't know how you can avoid
20 producing that.

21 MR. PIZZURRO: We have produced 2001
22 documents?

23 MS. STEINGART: You have produced 2001 and
24 I think that we asked when we said that some of the



1 documents were illegible, I think some of those were
2 2001 documents actually and you were providing us with
3 legible copies. That was just a technical thing with
4 the CD.

5 So I think that we do have 2001.

6 SPECIAL DISCOVERY MASTER JAMES: I see one
7 of the Fried, Frank lawyers rising.

8 MR. BREWER: I didn't remember an
9 objection on that particular timing thing and I was
10 trying to find it in the documents.

11 MS. STEINGART: There has not been an
12 objection on that basis before and we had been getting
13 2001.

14 MS. DELANEY: We had a standing objection
15 to documents prior to 2002, but because this transfer
16 actually took place, the initial transfer of the
17 assets to NorthWestern's subsidiary took place in
18 February of 2002, we went back into 2001 to reach
19 those regulatory submissions that were made prior to
20 that submission so that the record would be complete
21 now.

22 MS. STEINGART: Right. I can give you a
23 copy of your response. It's not in your response.

24 MS. DELANEY: You have the documents



1 though. What we have is a standing objection.

2 MS. STEINGART: I have the response. I
3 don't know where the standing objection is I'm telling
4 you. It's not in the response you gave us.

5 MS. DELANEY: I think we did at the time.

6 SPECIAL DISCOVERY MASTER JAMES: Well, I
7 have a representation from counsel, officers of the
8 court, that they have produced documents that relate
9 to 2001 to the extent it would have been incorporated
10 in the 2002 financials and I find that to be
11 acceptable.

12 MS. STEINGART: Fine.

13 SPECIAL DISCOVERY MASTER JAMES: Okay.
14 We're on number 15.

15 MR. PIZZURRO: We have said that we would
16 produce documents that related to the financial
17 statements for the fiscal year ended 2001 through the
18 present, to the extent there are such documents.
19 That's our response. That's one of the things we're
20 going through.

21 MS. STEINGART: The documents that relate
22 to questions raised by regulators with respect to
23 2001, financials, year end, et cetera, to the extent
24 that that exists, that would be part of that request.



1 SPECIAL DISCOVERY MASTER JAMES: Well,
2 let's hear from NorthWestern as to how they're reading
3 it and what they produced and then we will go from
4 there.

5 MS. STEINGART: Okay.

6 SPECIAL DISCOVERY MASTER JAMES: All
7 right. We have on the record what you said about
8 number 15.

9 Number 16.

10 MR. PIZZURRO: 16. 16 we objected to and I
11 believe that 16 is one of the documents or one of the
12 categories of requests that we thought might be
13 obviated with a stip. However, I do know that many,
14 many of the documents that relate to number 16 have
15 been produced. They have been produced by Houlihan
16 Lokey who undertook some analyses or we have been
17 producing them.

18 SPECIAL DISCOVERY MASTER JAMES: To the
19 extent that they have not been produced, I am ordering
20 them to be produced.

21 Request number 18.

22 MR. PIZZURRO: Yes. We objected to this
23 as it relates to Clark Fork.

24 SPECIAL DISCOVERY MASTER JAMES: But



1 produced everything with respect to NorthWestern?

2 MR. PIZZURRO: But we undertook to,
3 subject to our objection -- now this I have to say.
4 In reading this, I cannot say that our production
5 would encompass every one of these and this one
6 could -- and I'll grant Ms. Steingart this point if
7 this is the one to which she points saying this is
8 what we asked for in the remaining from there were 32
9 through 50, whatever it is in the second request. So
10 to the extent that we are still arguing over
11 everything that was produced to the SEC and everything
12 that may have been communicated with respect to any
13 restatement of a publicly issued financial statement
14 of NorthWestern and Clark Fork, we disagree that
15 that's relevant. That's essentially what we have been
16 arguing about.

17 SPECIAL DISCOVERY MASTER JAMES: Then we
18 will address that when we look at the second request.

19 19.

20 MR. PIZZURRO: Again, we undertook to
21 produce these documents and as I understand it they're
22 being produced.

23 SPECIAL DISCOVERY MASTER JAMES: Number
24 20.



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1 MR. PIZZURRO: Again, we objected to this
2 because it relates to Clark Fork. I believe that many
3 of these documents may have been produced. We can
4 look into this. This was another one of the requests
5 that would have been obviated if we had reached a
6 stipulation on the valuation issues.

7 SPECIAL DISCOVERY MASTER JAMES: Let me
8 ask you: Why do you want Clark Fork?

9 MS. STEINGART: Because in terms of
10 showing that it's a fraudulent conveyance part of it
11 is showing the insolvency of Clark Fork after the
12 transfer. So if you're a creditor of Clark Fork and
13 Clark Fork is solvent and then they take an asset
14 worth \$10 but only give Clark Fork \$5, Clark Fork
15 doesn't have \$10 to pay you. So it's the insolvency
16 of Clark Fork subsequently, the solvency before and
17 the insolvency after that's part of the cause of
18 action.

19 SPECIAL DISCOVERY MASTER JAMES: Isn't
20 that kind of easy to deal with in terms of documents?

21 MS. DELANEY: I don't know.

22 MR. PIZZURRO: I don't know. I honestly
23 don't know.

24 MS. STEINGART: Right. That's one of the



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1 stipulations that we provided that following the
2 transfer of these assets that Clark Fork was unable
3 without the outside assistance to pay its obligations
4 as they became due.

5 SPECIAL DISCOVERY MASTER JAMES: Okay.
6 I'm going to order those to be produced.

7 MR. PIZZURRO: Is that number 20?

8 SPECIAL DISCOVERY MASTER JAMES: Yes.
9 21.

10 MR. PIZZURRO: We are producing in
11 response to 21.

12 SPECIAL DISCOVERY MASTER JAMES: Okay.
13 Number 24.

14 MR. PIZZURRO: Yes, we are producing with
15 respect to 24.

16 SPECIAL DISCOVERY MASTER JAMES: 25.

17 MR. PIZZURRO: Yes, we are producing 25.

18 SPECIAL DISCOVERY MASTER JAMES: Okay. So
19 we made progress there in understanding what has been
20 produced.

21 So let's now turn to your responses to the
22 second set which begins with number 32. And you
23 indicate there that you are providing non-privileged
24 documents. Is that correct?



1 MR. PIZZURRO: Yes.

2 SPECIAL DISCOVERY MASTER JAMES: Request
3 number 33 which is, if I can paraphrase, basically any
4 document in the world provided to the SEC by
5 NorthWestern.

6 I guess, Ms. Steingart, I'm going to turn
7 to you on this one. That seems extraordinarily
8 overbroad.

9 MS. STEINGART: Well, the term SEC
10 investigation is defined to refer to the SEC
11 investigation of the restated financials. I'm just
12 looking for the SEC investigation definition.

13 SPECIAL DISCOVERY MASTER JAMES: Which
14 definition?

15 MS. STEINGART: It's number 12.

16 SPECIAL DISCOVERY MASTER JAMES: No.

17 MR. BREWER: 19.

18 MS. STEINGART: I'm sorry. I don't have
19 my reading glasses, Your Honor. It's 19.

20 SPECIAL DISCOVERY MASTER JAMES: Let me
21 read it.

22 What's the Wells notices?

23 MS. STEINGART: A Wells notice is
24 something that the subject of an investigation is



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1 invited to do when the SEC has determined or the staff
2 has determined that it may bring charges or recommend
3 charges to the Commission. Then the company is
4 invited to sort of write a brief and say this is why
5 what we did should not be the subject of action by the
6 SEC.

7 MR. BREWER: If I could interject,
8 NorthWestern has disclosed in I believe its most
9 recent 10-Q that a number of current and former
10 employees have received Wells notices.

11 SPECIAL DISCOVERY MASTER JAMES:
12 Mr. Pizzurro, what's your response to this?

13 MR. PIZZURRO: Well, I have a couple.
14 First of all, this is essentially what we're here
15 arguing about.

16 SPECIAL DISCOVERY MASTER JAMES: This is
17 the whole thing?

18 MR. PIZZURRO: This is everything and it
19 goes actually beyond that because it says -- and this
20 is a continuing problem, not the only one, but it's a
21 continuing problem. It's not all documents produced
22 or provided to the SEC by NorthWestern concerning the
23 2002 financials, a restatement of those financials.

24 I read this definition as broader, but if



1 I have counsel's representation that that's what SEC
2 investigation means and it has only to do with the
3 restatement of the 2002, at least I understand the
4 definition. I read this and I was unsure because it
5 says including, without limitation.

6 MS. STEINGART: It does include without
7 limitation. That's a fair statement.

8 SPECIAL DISCOVERY MASTER JAMES: You say
9 it does or does not?

10 MS. STEINGART: It says without
11 limitation. What counsel said was a fair statement.
12 And certainly we don't want everything for all periods
13 of time.

14 What we want are the investigations that
15 relate to the financials used during 2002 and that
16 were restated at the end of 2002.

17 MR. PIZZURRO: At least we know now what
18 the definition is. That is the universe of the 1.1
19 million documents.

20 Now, this request also is any other
21 person. Obviously that's objectionable. I mean, at
22 the very most all a party can be expected to produce
23 is documents that it has under its custody and
24 control. What may have been produced by another



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1 person I don't even know and I don't know if anybody
2 knows, other than the SEC might know.

3 MS. STEINGART: Right. I agree. It would
4 only need to be in your custody and control.
5 Sometimes companies do productions not only on behalf
6 of themselves, but they will make a production on
7 behalf of the person who was CFO at the company at the
8 time or they will make a production on behalf of
9 others who are being investigated or are the subject
10 of inquiry in addition to the company and that's all
11 this was meant to encompass.

12 Certainly we're not asking you to go and
13 ask other people. And to the extent that you think it
14 includes that, we can only ask you, we agree, for
15 what's in your custody and control.

16 MR. PIZZURRO: Having said that, even with
17 those two caveats, we're back to where we were at the
18 beginning of the day on this issue.

19 SPECIAL DISCOVERY MASTER JAMES:
20 Ms. Steingart, which of the requests in your first set
21 of document requests would you put this particular
22 request within?

23 MS. STEINGART: I would certainly put this
24 within 18. I want to go back to my first one. This



1 is my second one. I'm sorry.

2 "All documents concerning any possible or
3 actual restatement"...

4 SPECIAL DISCOVERY MASTER JAMES: "Of any
5 publicly issued financial statements."

6 MS. STEINGART: "Including, without
7 limitation, any communications with any governmental
8 agency."

9 I also think that it relates to 20 and 21
10 because I'm sure that the government received
11 documents created by both Deloitte and Arthur Andersen
12 in connection with the financials that it was
13 reviewing that were issued by NorthWestern.

14 And 15, all documents that relate to
15 publicly issued financial statements for NorthWestern
16 for the fiscal year ended 2001 through the present.

17 There's also some material that would be
18 relevant for year end 2001 because those year-end
19 financials were also used in connection with there was
20 a February application to regulators and in the first
21 quarter of '02 there was information given to
22 regulators that related to the year-end '01
23 financials, but we asked for that and I think that
24 NorthWestern said that we were getting the '01



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1 material.

2 MS. DELANEY: I only said that with
3 respect to submissions to the regulatory agencies that
4 preceded the February 15, 2002 approval.

5 SPECIAL DISCOVERY MASTER JAMES: Yes. I
6 think this is overbroad and I'm not going to require
7 NorthWestern to respond to this.

8 Let's move on to number 34.

9 MS. STEINGART: So 33 in its entirety is
10 too broad?

11 SPECIAL DISCOVERY MASTER JAMES: Yes.
12 Quite frankly, I think, if memory serves me, some of
13 the things sought there may be more discretely
14 requested in subsequent requests.

15 34, to which there is an objection.

16 MS. STEINGART: Well, 34 asks for
17 communications between NorthWestern and the SEC and
18 others concerning the SEC investigation. And if we
19 look at the SEC investigation as being related to the
20 restatement of the 2002 financials, I would imagine
21 that this is fairly discrete when limited to that.

22 SPECIAL DISCOVERY MASTER JAMES:
23 Mr. Pizzurro?

24 MS. STEINGART: As well as the Wells



1 notices. Wells notices are usually not more than
2 fifty, sixty, seventy pages long.

3 SPECIAL DISCOVERY MASTER JAMES: Right.

4 MR. PIZZURRO: Well, I mean, any document
5 concerning or reflecting oral or written communication
6 between NorthWestern or any other person --

7 SPECIAL DISCOVERY MASTER JAMES: Strike
8 "any other person."

9 MR. PIZZURRO: -- and the SEC. I mean,
10 what are we talking about here? I mean, I think if I
11 produce a document, that's a written communication.
12 Are we talking about what the lawyers had written to
13 the SEC? Are we talking about briefs that may have
14 been made in the context of this investigation? I
15 mean, I don't understand.

16 Oral communications? Are we talking about
17 now, as later on it gets picked up, are we talking
18 about all deposition transcripts?

19 MS. STEINGART: We'll get to those. But
20 certainly communications between companies and the
21 government, whether they be through lawyers or not,
22 are not privileged. I mean, these are -- so in
23 NorthWestern's hand these are not privileged
24 documents.



1 And to the extent that NorthWestern has
2 concerns about confidentiality, confidentiality
3 agreements are not a problem. We're happy to have the
4 confidentiality agreement that we have been
5 discussing. And to the extent that NorthWestern has
6 particular or special concerns and wants even more
7 special treatment of these kinds of documents, we're
8 open to that. I mean, that's never been a problem or
9 an issue.

10 You know, I think this is the kind of
11 thing that's objection damaging. I think that there
12 are a universe of core documents here. We have always
13 been willing to talk about narrowing and if there's
14 some subset of documents that Mr. Pizzurro wants to
15 talk about, we're very happy to do that. Striking
16 "any person," that's fine. You know, talking about
17 this in terms of the 2002 restatement if that's the
18 relevant arena from your point of view, that's fine
19 with us.

20 SPECIAL DISCOVERY MASTER JAMES: Let me
21 ask this question: Does the SEC investigation go
22 beyond, quote, restatement of NorthWestern's
23 financials for the fiscal year 2002?

24 MR. PIZZURRO: I don't understand that it



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1 does but, again, I can't speak with authority because
2 I don't represent the company in that context.

3 I would also point out that I would
4 expect, and I don't know, I would expect that an awful
5 lot of documents that would be encompassed within
6 number 34 would be protected by rule of evidence 408.
7 I would expect that a lot of that would be back and
8 forth concerning settlement negotiations, and we would
9 object obviously.

10 SPECIAL DISCOVERY MASTER JAMES: Well, you
11 obviously would put those on the log.

12 MS. STEINGART: Most respectfully, 408
13 just has to do with admissibility at trial for any
14 purpose. That's what 408 says.

15 It has nothing to do with being produced
16 in connection with discovery of a matter.

17 SPECIAL DISCOVERY MASTER JAMES: That will
18 be an argument for another day, apparently.

19 MS. STEINGART: Okay.

20 SPECIAL DISCOVERY MASTER JAMES: But I'm
21 going to order production of this, subject to the
22 limitation that it's only NorthWestern; it's not any
23 other person and that it's restricted to the
24 restatement of NorthWestern's financials for the



1 fiscal year 2002.

2 I am not including in this depositions or
3 other forms of discovery but simply the reports given
4 by NorthWestern, reports, communications, the
5 underlying communications that it has been required by
6 the SEC to give to the SEC.

7 Now, when you talked about depositions
8 before, Mr. Pizzurro, is that depositions from the
9 underlying cases that the SEC wants or has the SEC
10 taken depositions itself of NorthWestern?

11 MR. PIZZURRO: My understanding is that
12 they have taken depositions.

13 SPECIAL DISCOVERY MASTER JAMES: Okay.
14 Those are offlimits.

15 Okay. Request number 35, "All documents
16 provided by the SEC to NorthWestern or any other
17 Person in connection with the SEC Investigation."

18 Ms. Steingart, again, this seems -- well,
19 perhaps the SEC hasn't provided that much to
20 NorthWestern. So I guess, Mr. Pizzurro, what's your
21 take on this?

22 MR. PIZZURRO: Well, frankly, if you look
23 at number 32 which we said that we would produce,
24 that's document requests, information requests and/or



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1 subpoenas. Now, I don't know --

2 SPECIAL DISCOVERY MASTER JAMES: Of
3 anything else?

4 MR. PIZZURRO: -- of anything else, but I
5 can't deal with something that's so broad that I can't
6 define.

7 SPECIAL DISCOVERY MASTER JAMES: Right.

8 MS. STEINGART: There are other kinds of
9 written material that the SEC does provide from time
10 to time to subjects or targets and if counsel has
11 that -- it's certainly not a lot. It's a very limited
12 kind of communication.

13 SPECIAL DISCOVERY MASTER JAMES: Such as?

14 MS. STEINGART: Sometimes they will do
15 letters to describe either things that they're looking
16 for or reports or it doesn't have a name like a Wells
17 submission or a subpoena, but sometimes there is
18 written correspondence between the SEC and a company.
19 And that's all really that addresses.

20 That just really picks up the odd thing
21 that's not included in 32. It wouldn't be voluminous.

22 SPECIAL DISCOVERY MASTER JAMES: Okay.
23 I'm going to order that to be produced.

24 MR. PIZZURRO: Can we get the "or any



1 other Person" language out of request number 35?

2 SPECIAL DISCOVERY MASTER JAMES: Yes. In
3 fact, unless otherwise indicated, we can count that
4 out of all of these. I may change my mind as I go
5 through these things. Ms. Steingart may change my
6 mind on some of them, but for present purposes that's
7 I think well beyond the scope.

8 36.

9 MR. PIZZURRO: I think we just discussed
10 that.

11 MS. STEINGART: Right. I think we just
12 discussed that. You indicated that should not be
13 produced.

14 SPECIAL DISCOVERY MASTER JAMES: Right.
15 Okay.

16 37. Yes. So that's out too.

17 38.

18 MS. STEINGART: These would refer to
19 documents that were provided after deposition to the
20 SEC in connection with the 2002 restatement to the
21 extent that other things became relevant as a result
22 of the --

23 SPECIAL DISCOVERY MASTER JAMES: Since I'm
24 not requiring them to produce depositions and whatnot,



1 I don't think -- this is not one of them that I'm
2 going to require them to respond to.

3 39. Okay. 39 begins a series dealing
4 with other investigations, the Department of Justice.
5 What are the Montana proceedings called, their full
6 name, for the record?

7 You have the acronyms. You should know
8 this by heart.

9 MS. STEINGART: I should know this by
10 heart. It's one of the things I don't know by heart,
11 but I'm losing those brain cells slowly as this case
12 continues.

13 MR. BREWER: It's definition 10 and 11.

14 SPECIAL DISCOVERY MASTER JAMES: Thank
15 you.

16 MS. STEINGART: John, thank you.

17 So MCC is Montana Consumer Counsel and
18 MPSC is the Montana Public Service Commission.

19 SPECIAL DISCOVERY MASTER JAMES: All
20 right. And these really run the gamut from 39, 40
21 through...

22 MS. STEINGART: I think it goes to 45.

23 SPECIAL DISCOVERY MASTER JAMES: No. It
24 goes beyond that.



1 MS. STEINGART: Starting at 46 we have the
2 McGreevey, so it goes from 39 through 45.

3 SPECIAL DISCOVERY MASTER JAMES: But
4 counting McGreevey.

5 MS. STEINGART: Well, McGreevey, you know,
6 is 46 through 50. There are no such documents.

7 SPECIAL DISCOVERY MASTER JAMES: So those
8 are all moot.

9 MS. STEINGART: So those are all moot.
10 So 46 through 50 we don't have to talk about at all.
11 So the ones that refer to the other government
12 agencies are 39 through 45.

13 SPECIAL DISCOVERY MASTER JAMES: Okay.

14 MS. STEINGART: These are a part of the
15 things that NorthWestern -- you know, some of them are
16 it's just congruent with the requests that we have
17 made with respect to the SEC. The topic is the same.
18 It would be the 2002 restatement.

19 And some of these are things that relate
20 to investigation of the 2002 restatement and others
21 are materials that were submitted in connection with I
22 guess the approvals were in a different category, so
23 those we got. So this would be only in connection
24 with the investigation.



1 SPECIAL DISCOVERY MASTER JAMES: Is there
2 anything, any areas, categories that would be unique
3 to the Montana proceedings that would help you
4 demonstrate the fraudulent intent that would not have
5 been required to be submitted as part of the SEC
6 investigation?

7 MS. STEINGART: Not being as familiar with
8 these kinds of investigations as I am with SEC
9 investigations, I can only surmise. So I want you
10 to -- but the Montana consumer probe and the Public
11 Service Commission would also have concern with the
12 status of Clark Fork, not only the falsity of the
13 NorthWestern financials at the parent level. They
14 would have concern with the impact of the falsity of
15 those financials on all of the operating companies
16 that delivered energy.

17 SPECIAL DISCOVERY MASTER JAMES: But I
18 don't really see how that helps you that much in
19 demonstrating fraudulent intent because we know that
20 it's been admitted that the value given, or at least I
21 think it has, the value given for Clark Fork was
22 grossly inadequate.

23 MR. PIZZURRO: Well, not --

24 MS. STEINGART: He hasn't admitted it.



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1 MR. PIZZURRO: I have not admitted it.

2 SPECIAL DISCOVERY MASTER JAMES: Oh, I'm
3 sorry.

4 MS. STEINGART: He hasn't admitted it. He
5 says he will, he says he will, but he hasn't admitted
6 it yet.

7 SPECIAL DISCOVERY MASTER JAMES: But, in
8 any event, it shows that the assets were X and all
9 NorthWestern did was assume the debt, paid no
10 consideration for the assets. Draw your own
11 conclusions from that.

12 MS. STEINGART: Right. This goes more to
13 these agencies looking back to the approval they gave
14 and saying wait a minute; did I really want to give
15 this approval to the going flat transaction? These
16 agencies began to reexamine, as I understand it and as
17 I understand the settlement that was done in
18 connection with the bankruptcy, the agencies
19 reexamined their review of the going flat transaction
20 and questioned whether they would have given the
21 approvals they gave or would not require refinancing
22 or other actions taken with respect to the energy
23 assets.

24 SPECIAL DISCOVERY MASTER JAMES: Right.



1 MS. STEINGART: So this would be a
2 circumstance where these agencies would say because of
3 the falsity of A, B and C, this should not have
4 happened with respect to Clark Fork.

5 SPECIAL DISCOVERY MASTER JAMES: But how
6 does that help you show that the indenture trustee was
7 fraudulently induced?

8 MS. STEINGART: Well, to the extent that
9 these agencies were relying on the same financial
10 information or had before them the same financial
11 information that was presented to the trustee, then it
12 would give an indication that the trustee was misled
13 and that there was a general effort by NorthWestern
14 during this time to obtain those assets so that it
15 could bolster NorthWestern despite of NorthWestern's
16 insolvency and in a manner that was harmful to Clark
17 Fork.

18 SPECIAL DISCOVERY MASTER JAMES: Let me
19 get a bit of historical understanding here of the
20 transaction.

21 Before the third amended indenture was
22 approved which contained the release, what was the
23 status of the approval, if any, by the Montana Public
24 Service Commission or whatever of the deal?



1 MS. STEINGART: During 2002 there was a
2 review by these agencies of the deal. And according
3 to NorthWestern, what they told the agencies was that
4 the assets would either remain at the sub or would be
5 upstream to the parent. And in connection with that,
6 they had to make certain representations about the
7 financial condition and solvency of NorthWestern.

8 And then what the agency said was that you
9 can proceed to either hold it in the sub, based on
10 these financials you can hold it in the sub or you can
11 upstream it. And if those financials were false, just
12 as the financials used with the trustee were false,
13 then that is part of the fraudulent scheme. And this
14 is part of the defense at least that was offered
15 before Judge Case as to why there was no question that
16 could be posed with respect to these transactions,
17 that the representations made to the regulators were
18 the same as the representations made to the U.S.
19 Trustee -- I'm sorry -- to the indenture trustee.

20 SPECIAL DISCOVERY MASTER JAMES: Are there
21 allegations in your amended complaint that the trustee
22 was fraudulently induced in part because of its
23 reliance on what had happened with the Montana
24 regulatory agencies?



1 MS. STEINGART: No, we do not have that
2 allegation in the complaint, but I don't think that we
3 need to to get discovery. It's one thing for someone
4 to say that either this is not relevant at trial or
5 the connection you have shown between the use of the
6 financials in these two circumstances are not linked
7 enough so that you can either infer one from the other
8 or see a pattern of wrongdoing with respect to these
9 financials or see a pattern of wrongdoing with respect
10 to the effort to draw the assets out of Clark Fork.

11 One might say that at a later stage, but I
12 think that when we're talking about discovery I think
13 it's relevant enough to get discovery of it, you know,
14 to show that this was part of an overall effort to get
15 these assets out of Clark Fork to try to bolster the
16 failing NorthWestern.

17 So while the trustee may not have relied
18 upon it, it would be part of an overarching fraud.
19 Indeed, once we saw these if a trial judge or someone
20 else said look, it's not relevant, too far removed,
21 fine, but at this stage I don't think it means that we
22 don't at least get to see them and think about them
23 and try to draw that connection.

24 SPECIAL DISCOVERY MASTER JAMES: How much



1 of this is publicly available?

2 MS. STEINGART: I don't know. I can
3 check. But certainly it would be easier for us to get
4 it from the defendant than to make a FOIA request,
5 though I'm happy to make a FOIA request.

6 SPECIAL DISCOVERY MASTER JAMES: How much
7 has actually been produced to Magten?

8 MR. PIZZURRO: In relationship to?

9 SPECIAL DISCOVERY MASTER JAMES: That
10 relates to the Montana commission proceedings.

11 MR. PIZZURRO: I don't know. I honestly
12 don't know.

13 SPECIAL DISCOVERY MASTER JAMES: Has any?

14 MS. DELANEY: Some have because the
15 closing documents have been produced.

16 MS. STEINGART: No. This is the
17 investigation that we're talking about in this
18 request, not the --

19 MS. DELANEY: The investigation by whom?

20 MS. STEINGART: By either the MPCC -- I'm
21 sorry. The MCC or the MPSC. There was a settlement
22 entered in connection with the bankruptcy of the
23 investigation.

24 MR. PIZZURRO: I'm not sure that I can --



1 MR. BREWER: I believe I can relate it to
2 the documents in the record, just so everyone is on
3 the same page.

4 This is Exhibit B and C to our
5 supplemental submission dated January 19th. One is a
6 final order of the Montana commission. The other is a
7 settlement with NorthWestern. And so I'm not sure if
8 those were two aspects of the same proceeding or two
9 separate regulatory proceedings, but I think those two
10 documents produced in connection with those two
11 proceedings are what we're mostly talking about here.

12 MR. PIZZURRO: May I make a point?

13 SPECIAL DISCOVERY MASTER JAMES: You can
14 make as many points as you want.

15 MR. PIZZURRO: Thank you.

16 What Ms. Steingart said in large part is
17 absolutely correct, except in the most critical part
18 because what Ms. Steingart is saying is that she's
19 justified in getting these documents because it will
20 show that if the regulators were induced to provide
21 approval for the assets to be acquired by NorthWestern
22 in reliance on the same financial statements that may
23 have been produced to the indenture trustee, that goes
24 to her theory of fraud in the inducement of the



1 release. That's fine, except here's the problem: The
2 approval, as she pointed out, was given by the
3 regulatory authorities in February 2002. Let's not
4 forget something here. NorthWestern purchased these
5 assets from Montana Power in a transaction that began
6 in 2000. NorthWestern paid and bought these assets
7 and put them in its subsidiary.

8 SPECIAL DISCOVERY MASTER JAMES: They were
9 wholly owned subsidiaries?

10 MR. PIZZURRO: Correct. And at the time
11 that the regulators were asked to approve that
12 transfer, that is to say the transfer of the utility
13 assets from Montana Power to NorthWestern, even though
14 it's being done with subsidiaries and membership
15 interests in LLC's, NorthWestern, as Ms. Steingart
16 pointed out, said to the regulators we're either going
17 to keep these assets in the sub or we're going to move
18 them up into the parent at some point in the future.
19 And the transaction was approved on that basis.
20 That's February 2002. None of the restated
21 financials, none of the offending financial statements
22 existed because we're talking about, as we have
23 defined, 2002 first quarter, second quarter, third
24 quarter. That's what was restated.



1 So what the regulators relied on in
2 providing approval for NorthWestern to take these
3 assets and either hold it in a sub or move them up was
4 based on financials that reflected the company's
5 position as of 2001. There weren't any 2002
6 financials. So what the regulators may have looked
7 at, how that sort of dovetails in with her theory of
8 this is the same thing that the indenture trustee was
9 looking at is absolutely different. It's a completely
10 different set of financials.

11 MS. STEINGART: The final order recites
12 that on December 23rd --

13 SPECIAL DISCOVERY MASTER JAMES: Where are
14 you reading from? Part of the record?

15 MS. STEINGART: I'm looking at our
16 supplemental submission, the exhibit that Mr. Brewer
17 just referenced.

18 SPECIAL DISCOVERY MASTER JAMES: Is this
19 the reply or the supplemental brief?

20 MS. STEINGART: It's the supplemental,
21 it's the first one that we filed.

22 SPECIAL DISCOVERY MASTER JAMES: Which
23 exhibit?

24 MS. STEINGART: And it's Exhibit B, the



1 final order of the Montana Public Service Commission.
2 And it recites, the first paragraph says on December
3 23rd, 2002, NorthWestern filed an application to get
4 permission to do something. And the thing that it
5 filed permission to do was to continue to consummate
6 and take steps in connection with the transaction that
7 had been presented and to sort of use the assets, to
8 encumber the assets in connection with further loans
9 that it wanted to have from CSFB.

10 And then there's a stipulation of
11 settlement thereafter, which is the next exhibit,
12 Exhibit C, which talks about an investigation and a
13 hearing that the commission had with respect to the
14 approvals given for the events that were involved in
15 the going flat transaction and in using the assets to
16 finance further loans by NorthWestern. So there were
17 additional submissions made to these commissions as
18 the transaction moved along and as different aspects
19 of the transaction were completed during that year
20 from the beginning of February to November to
21 December.

22 And at various points along the way the
23 commission was brought up to date and given further
24 information. And then when there was a sudden



1 restatement just weeks after that and then the filing
2 of the bankruptcy, the commission began its
3 investigation of that whole series of submissions.
4 And that's the investigation that we're trying to get
5 the information about because I think that the
6 commission questioned what it did based on the true
7 financials it then received.

8 SPECIAL DISCOVERY MASTER JAMES: What does
9 the Department of Justice investigation relate to? Is
10 it identical to the SEC and, if it is, why are they
11 wasting our tax money?

12 Do you know, Mr. Pizzurro?

13 MR. PIZZURRO: I don't know. I don't know
14 the answer to that question, either question.

15 MS. STEINGART: I can try to shed some
16 light. I don't know what this particular one is.
17 But, generally, if there is wrongdoing with respect to
18 public financials which amounts to criminal
19 wrongdoing, the Department of Justice will --

20 SPECIAL DISCOVERY MASTER JAMES: The
21 Department of Justice gets involved.

22 MS. STEINGART: -- sort of bring the
23 criminal charges that are analogues to the SEC's
24 jurisdiction.



1 SPECIAL DISCOVERY MASTER JAMES: All
2 right. Now, where did we stop on the requests?

3 MS. STEINGART: I think we were looking at
4 the ones that were 39 through 45, which dealt with the
5 additional investigations being done by DOJ, Montana
6 Public Service Commission, et cetera.

7 SPECIAL DISCOVERY MASTER JAMES: Yes,
8 that's a big et cetera: "Or any other federal or
9 state governmental agency."

10 MS. STEINGART: If there aren't any
11 others, I'm happy to...

12 MR. PIZZURRO: If there aren't any others,
13 I'm sure you are.

14 MS. STEINGART: We could talk about the
15 scope if you told me there were others. We could
16 narrow it or limit it if you would tell me what was
17 out there.

18 SPECIAL DISCOVERY MASTER JAMES: Well, 39
19 on its face sort of seems the equivalent of one we saw
20 with the SEC, which is requests made by these agencies
21 to NorthWestern, subpoenas, et cetera.

22 So on this one I'm going to require
23 NorthWestern to respond but only as it relates to the
24 MPSC and the MCC, not the DOJ, and because the



1 catchall is not sufficiently clear, nothing as to
2 that.

3 Now, 40 --

4 MS. STEINGART: I will voluntarily delete
5 DOJ and any other federal agency from 40, if that
6 helps.

7 SPECIAL DISCOVERY MASTER JAMES: Okay.
8 That's a start.

9 MS. STEINGART: So we would just limit it
10 to the MPSC or the MCC.

11 MR. PIZZURRO: Well, I think conceptually
12 there really isn't that much, although the universe
13 might be smaller, but conceptually there's no
14 difference between that and number 33, which was
15 everything produced to the SEC which has already been
16 struck.

17 MS. STEINGART: Well, smaller is better
18 and this does really relate to the going flat. It
19 goes to the review of their approval of the going flat
20 transaction.

21 SPECIAL DISCOVERY MASTER JAMES: Yes. As
22 worded, number 40 is overbroad.

23 41.

24 MS. STEINGART: Well, is there a universe



1 within that that would be appropriate?

2 SPECIAL DISCOVERY MASTER JAMES: That's
3 what we're getting to next, I believe, number 41.

4 MS. STEINGART: I certainly will take out
5 the "any other Person" and we will take out the any
6 other federal agency and the DOJ.

7 SPECIAL DISCOVERY MASTER JAMES: All
8 right. With that qualification, I'm going to order
9 them.

10 MR. PIZZURRO: Can I get an understanding?
11 If we look at -- now, I don't want to get whipsawed on
12 this thing. If we look at the definition of
13 investigation in this document request, which is
14 paragraph 8, it's way beyond what Ms. Steingart said
15 she's interested in. If we can narrow it to what she
16 said she's interested in, at least I know what I'm
17 dealing with.

18 But this "refers to any formal or informal
19 investigation or inquiry conducted by the DOJ, MPSC or
20 any other federal or state governmental agency,
21 including, without limitation, the investigation that
22 resulted in the stipulation and settlement between
23 NorthWestern, the MPSC and the MCC, dated as of July
24 8, 2004 (MPSC Docket No. D2003.8.109), and any other



1 investigations concerning the Transfer, NorthWestern's
2 financial statements, the solvency and ability of
3 NorthWestern and Clark Fork to meet their future
4 obligations and/or any of the allegations contained in
5 Plaintiffs' Complaint."

6 So this is now a huge universe.

7 SPECIAL DISCOVERY MASTER JAMES: That's a
8 legitimate point.

9 MS. STEINGART: So let's talk about the
10 transfer.

11 SPECIAL DISCOVERY MASTER JAMES: Let me
12 look at this for a moment.

13 MS. STEINGART: Sure.

14 SPECIAL DISCOVERY MASTER JAMES: Okay.
15 Ms. Steingart, do you have a proposal for reducing the
16 scope of this definition?

17 MS. STEINGART: I do. I would take out
18 the words "without limitation." I certainly would
19 just limit it to the MPSC or the MCC as we have the
20 request. I would take out any other state or
21 government agency.

22 SPECIAL DISCOVERY MASTER JAMES: "Federal
23 or state governmental agency."

24 MS. STEINGART: Right. So it would just



1 be the formal or informal investigation or inquiry by
2 MPSC or MCC, and I would take out "without
3 limitation," that resulted in the stipulation and
4 settlement, which we just referred to, and I would
5 take out "any other investigation." I would say
6 concerning the transfer and I think that
7 NorthWestern's financial statements, I think that's
8 fair to include. The solvency and ability of
9 NorthWestern and Clark Fork to meet their obligations.
10 And you said that the complaint has very few, if any,
11 allegations that go to this.

12 So why can't we leave in the allegations
13 of the complaint that have relevance?

14 MR. PIZZURRO: Any investigation that is
15 relevant to any allegation contained in the complaint?
16 So the burden is now on us to parse the complaint and
17 determine whether -- I mean, I just think that's
18 unreasonable.

19 SPECIAL DISCOVERY MASTER JAMES: Yes. I
20 do too.

21 MS. STEINGART: So we will take out the
22 last clause. How's that?

23 SPECIAL DISCOVERY MASTER JAMES: Yes.

24 MS. STEINGART: So there will be a period



1 after the words "their future obligations."

2 MR. PIZZURRO: Okay. Could you then
3 please read for me what you propose is the definition
4 of investigation?

5 MS. STEINGART: A sentence that's
6 grammatically correct?

7 MR. PIZZURRO: As close as we can get.

8 SPECIAL DISCOVERY MASTER JAMES: Let me
9 read it for the record as I understand it:
10 Investigation refers to any formal or informal
11 investigation or inquiry conducted by the MPSC or the
12 MCC with respect to the investigation that resulted in
13 the stipulation and settlement between NorthWestern,
14 the MPSC and the MCC dated as of July 8, 2004 (MPSC
15 Docket No. D2003.8.109) concerning the transfer,
16 NorthWestern's financial statements, the solvency and
17 ability of NorthWestern and Clark Fork to meet their
18 future obligations, period.

19 All right. With that qualification, I
20 think that takes care of number 41.

21 Number 42.

22 MS. STEINGART: We would limit 42 in the
23 same way. We would take out DOJ, take out any other
24 federal or state agency, so all documents provided by



1 MPSC and/or MCC to NorthWestern in connection with the
2 investigation as the definition is modified.

3 SPECIAL DISCOVERY MASTER JAMES:

4 Mr. Pizzurro?

5 MR. PIZZURRO: Let me just see for one
6 second.

7 Okay. That seems to me to be consistent
8 with what you have already done.

9 SPECIAL DISCOVERY MASTER JAMES: Yes.

10 43 I'm not going to require production of.
11 If you want to try to get this stuff, you can get it
12 directly from those authorities.

13 44 relates to 43. Therefore, I'm not
14 requiring that.

15 The same for 45.

16 Now we get to the McGreevey asset transfer
17 action. Tell me a little bit about that,
18 Ms. Steingart.

19 MS. STEINGART: Well, 46 through 50
20 NorthWestern has already said they have none. We're
21 perfectly willing to accept that representation.

22 SPECIAL DISCOVERY MASTER JAMES: All
23 right.

24 MS. STEINGART: So that brings us to 51.



1 SPECIAL DISCOVERY MASTER JAMES: What is
2 NorthWestern Growth?

3 MS. STEINGART: As I understand it,
4 NorthWestern Growth was an entity used by
5 NorthWestern's management team to obtain extra
6 compensation in connection with the inflated
7 financials. So it was an entity through which stock
8 options and other compensation were awarded to the
9 management based on general performance of
10 NorthWestern.

11 You can correct me in I'm wrong about
12 that, but from its public filings that's what I
13 understand.

14 SPECIAL DISCOVERY MASTER JAMES:
15 Mr. Pizzurro, what's your understanding of
16 NorthWestern Growth?

17 MR. PIZZURRO: My understanding of
18 NorthWestern Growth is very limited. I know it is a
19 holding company in the corporate organizational chart
20 which holds the Expanets and Blue Dot investments, as
21 well as others.

22 I don't really understand what any of this
23 has to do with the case. It's pointed out to me that
24 in the initial, in the initial document requests they



1 had already asked for compensation paid at least to
2 Hanson and Kindt since the going flat transaction, as
3 well as what law firms were paid and other
4 professionals, and we objected to all of those. They
5 have not come back to us on that.

6 I really don't understand this whole
7 theory. If people got stock options, so what? The
8 financials were false or they weren't false. Did they
9 use the false financials to get themselves stock
10 options? I don't know. But is every aspect now open
11 so that Ms. Steingart is going to show us -- now the
12 overarching scheme is gone because we're not talking
13 anything about the going flat. We're not even close.
14 Now we have some sort of pattern, if you will, which
15 is not anywhere near any allegation in this case.

16 SPECIAL DISCOVERY MASTER JAMES:

17 Ms. Steingart, what's your position?

18 MS. STEINGART: I think that there was in
19 2002 -- we know that the financials for three of the
20 quarters were restated. We know that the financials
21 for the year were restated. Yet we know that these
22 are the basic materials upon which regulatory
23 approvals were sought, the trustee's sign-offs were
24 sought, compensation was paid, and I think that it



1 shows intent. I think that it shows that there were
2 reasons and motivations; that it wasn't just that the
3 columns didn't add up correctly or that people made
4 some sort of good faith projection about what would
5 happen that didn't happen.

6 I think a lot of consequences flowed
7 during this period of time to this -- and we weren't
8 talking about inflated by insignificant amounts.
9 We're talking inflated by very, very substantial
10 amounts. And generally managements that are
11 incentivized to do that because they have mechanisms
12 to also increase their own compensation to show that
13 you did something recklessly as well as negligently,
14 you know, it's more than negligent. So if they did it
15 recklessly because only they were looking at their own
16 financial...

17 SPECIAL DISCOVERY MASTER JAMES: Well-
18 being.

19 MS. STEINGART. ...well-being as opposed
20 to just gee, let's screw the QUIPS holders, I think
21 that that matters. Again, once we have discovery of
22 this, somebody could say at trial too attenuated,
23 can't use it. But at the discovery phase, I think we
24 need to be able to evaluate how and why the financials



1 turned out to be as inaccurate as they were.

2 And the fact that this is a serious and
3 far-reaching thing is confirmed by the number and
4 length of the investigations that have happened, so
5 we're not making something up out of whole cloth here,
6 we really aren't.

7 SPECIAL DISCOVERY MASTER JAMES: I think
8 one of your colleagues wants to aid your memory on
9 this.

10 MS. STEINGART: Okay.

11 (Discussion off the record.)

12 MR. KAPLAN: One thing also just for the
13 record is when the transfer was being reviewed by the
14 Montana regulators, one of the things that they did
15 note was the utilization of NorthWestern Growth
16 Corporation to what it looked to them like there was
17 some accounting improprieties and they ordered in
18 connection with, at some point they ordered
19 NorthWestern to cease making any further payments to
20 management because they said that it is completely
21 inappropriate.

22 So this was something around the time of
23 the transfer when the financial statements were out
24 there that I guess one of the regulators had a lot of



1 questions about. And the only other thing is at least
2 one of the officers who was receiving payments was
3 fired for cause immediately upon the filing of the
4 Chapter 11. So in the context of the fraudulent
5 scheme, you have a regulator agency saying that's
6 inappropriate conduct and you have a senior officer
7 fired for cause who was participating in this.

8 SPECIAL DISCOVERY MASTER JAMES: Would any
9 of this have been, would any of this be included in
10 the prior requests that relate to the MP, the MCC or
11 MP, whatever, the Montana proceedings?

12 MS. STEINGART: Well, to the extent
13 because --

14 SPECIAL DISCOVERY MASTER JAMES: Or, for
15 that matter, would some of this stuff have been
16 included in the SEC investigation?

17 MS. STEINGART: Well, it would have been.

18 SPECIAL DISCOVERY MASTER JAMES: It would
19 have been.

20 MS. STEINGART: But to a large extent the
21 document requests that have been eliminated from this
22 deal with -- NorthWestern now does not have to produce
23 to us the documents they provided either to the
24 Montana Public Service Commission or the SEC. That's



1 one of the ways in which we have just narrowed these.

2 SPECIAL DISCOVERY MASTER JAMES: Well,
3 that's not exactly true.

4 MS. STEINGART: Some of them are coming
5 through, but I don't think when we were going through
6 the document requests --

7 SPECIAL DISCOVERY MASTER JAMES: The only
8 ones that I struck on that were the ones that included
9 everything in the world.

10 MS. STEINGART: But to the extent that
11 counsel says that in response to document requests in
12 the first response that covered those generally 14 or
13 13 or 18, that those are being produced, that's fine.
14 But I don't know that that's what counsel said.

15 SPECIAL DISCOVERY MASTER JAMES:
16 Mr. Pizzurro.

17 MR. PIZZURRO: Well, the explanation that
18 I just heard for why these documents are relevant is
19 that somehow it influenced or impacted upon these
20 regulators. And you have said that all documents
21 provided I think it's by or to --

22 SPECIAL DISCOVERY MASTER JAMES: Right, it
23 is.

24 MR. PIZZURRO: -- in connection with what



1 we have defined as the relevant investigation is
2 already called for. So now just all documents
3 relating to NorthWestern Growth, I don't know what --
4 first of all, I don't know what that means. I don't
5 know why this is relevant except to the extent, and
6 I'm not sure I agree with that, but if the documents
7 were provided in the context of an investigation like
8 that and you ordered us to produce them, then they
9 would be produced if there are any.

10 But everything that relates to
11 NorthWestern Growth?

12 SPECIAL DISCOVERY MASTER JAMES: Yes. I
13 see your point on that.

14 What I am going to do is rule that with
15 respect to NorthWestern Growth to the extent it comes
16 within the ambit of the prior requests that relate to
17 the Montana investigations that I have said I've
18 ordered NorthWestern to produce or, for that matter,
19 the SEC requests which I've ordered to be produced,
20 then they should be produced as well, but to the
21 limited extent previously discussed.

22 So that takes us through 51.

23 MS. STEINGART: Just so that I understand
24 that, we would be getting the documents about



1 NorthWestern Growth that were given to the Montana
2 Public Service Commission?

3 SPECIAL DISCOVERY MASTER JAMES: Yes.

4 MS. STEINGART: Okay. Thank you.

5 MR. PIZZURRO: I don't want to end up
6 having a letter-writing campaign in a week.

7 SPECIAL DISCOVERY MASTER JAMES: No.
8 Let's make this clear today.

9 MR. PIZZURRO: As I understand it, what
10 you have ruled, which is I don't think the same as
11 what Mrs. Steingart just said --

12 MS. STEINGART: I didn't mean to say...

13 MR. PIZZURRO: Okay. Just so we
14 understand, obviously if a request as has been
15 retooled here or you have retooled here calls for the
16 production of documents that relate to NorthWestern
17 Growth, those documents will be produced. And if
18 that's all that Ms. Steingart meant to say, I have no
19 problem.

20 SPECIAL DISCOVERY MASTER JAMES: That is
21 subject to the definition, I believe, of
22 investigation, which is the critical component for
23 determining the scope.

24 MR. PIZZURRO: Yes.



1 MS. STEINGART: Right.

2 SPECIAL DISCOVERY MASTER JAMES: Okay.

3 MR. PIZZURRO: Yes.

4 SPECIAL DISCOVERY MASTER JAMES: That
5 brings us to 53? No. That's NorthWestern as well.

6 MS. DELANEY: To 52.

7 MS. STEINGART: Well, 52 is just the
8 financial statements for NorthWestern Growth for 2001
9 through 2003.

10 SPECIAL DISCOVERY MASTER JAMES: Yes.
11 Let's produce those. That's easy.

12 What about 53?

13 MS. STEINGART: 53 is just Deloitte &
14 Touche's review of those documents. I would
15 voluntarily, you know, limit that to 2001 to 2003 as
16 well, if that would be helpful.

17 SPECIAL DISCOVERY MASTER JAMES: 2001 and
18 2003?

19 MS. STEINGART: No. 2001 through 2003.

20 MR. PIZZURRO: Theoretically, that could
21 be hundreds of thousands of pages of documents. What
22 are you talking about? Accountant's work papers?

23 MS. STEINGART: You said it's just a
24 holding company. Why is it going to be hundreds of



1 thousands --

2 MR. PIZZURRO: I have no idea. I really
3 have no idea. "All documents relating to Deloitte &
4 Touche's review of financial information, operating,
5 and other data related to NorthWestern Growth."
6 Frankly, why that's any less broad than 50 and any
7 more relevant than what would be subsumed in the other
8 requests we're talking about, I don't understand.

9 MS. STEINGART: Well, we have modified
10 2001 through 2003. I think you're right that there is
11 some overlap with other requests. And if on your
12 inspection you believe that this is hundreds of
13 thousands of pages, we certainly can talk about that.

14 SPECIAL DISCOVERY MASTER JAMES: Let's
15 make it clear today because talking hasn't worked out
16 too well so far in this case and we're approaching the
17 deadline and I want to make it clear today so we don't
18 have further disputes about it.

19 I think it's a legitimate source of
20 inquiry, but I do think that it needs to be reduced in
21 scope. And I'm not sure. Mr. Pizzurro, do you think
22 if we limit it to the extent that we have limited the
23 others such as NorthWestern Growth that that would be
24 manageable?



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1 MR. PIZZURRO: Limit it how?

2 SPECIAL DISCOVERY MASTER JAMES: Limit it
3 so that it only relates to the investigation.

4 MR. PIZZURRO: If it only relates to the
5 investigation as we have defined it, I think that is
6 probably very doable.

7 SPECIAL DISCOVERY MASTER JAMES: Okay.
8 Well, let's have that produced on that basis.

9 MS. STEINGART: Thank you.

10 And 54 they have said they will produce,
11 so we have no disagreement there. Correct?

12 SPECIAL DISCOVERY MASTER JAMES: Correct.

13 MR. PIZZURRO: That's correct.

14 SPECIAL DISCOVERY MASTER JAMES: So we
15 have managed to cut the Gordian knot to some extent
16 with respect to these requests. However, that does
17 leave one major issue open. We have dealt with
18 relevance and scope and now we have to deal with
19 timing.

20 I thought about this a great deal and in
21 light of what we have ordered to be produced today, I
22 am going to require NorthWestern to have substantially
23 completed its production of documents in response to
24 these two document requests, except for good cause



1 shown, no later than March 16, 2007 with a privilege
2 log relating to that production no later than March
3 23.

4 Any questions?

5 MR. PIZZURRO: Understood.

6 MS. STEINGART: I would just request, to
7 the extent that it's possible, for NorthWestern to
8 front load as much of that production as you can do
9 and if we can be of assistance in that by doing
10 anything.

11 SPECIAL DISCOVERY MASTER JAMES: Yes.
12 This is going to be done on a rolling production
13 basis?

14 MR. PIZZURRO: Yes. We have been engaged
15 in rolling production.

16 SPECIAL DISCOVERY MASTER JAMES: You have
17 200,000 documents now. You can start certainly
18 reviewing those and that should inform you as to the
19 witnesses you're going to need to depose. To the
20 extent some of those are third parties, you already
21 have enough documents to start deposing people, start
22 doing it. But that will give you certainly a good six
23 weeks to take depositions, which given the restriction
24 on the number of depositions I think is fair to all



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1 concerned.

2 MS. STEINGART: Yes.

3 SPECIAL DISCOVERY MASTER JAMES: And so
4 with that, for reasons of expedition I'm going to
5 treat today's hearing transcript, which will need to
6 be produced on an expedited basis, as my report and
7 recommendation to Judge Farnan. I will issue a pro
8 forma order that says something to that effect
9 tomorrow or the next day, whenever I get the
10 transcript.

11 So to the extent someone wants to take an
12 appeal or whatever from my decision, your time will
13 run from whenever that order issued, which should
14 hopefully be tomorrow or the next day.

15 Thank you for all of your patience and
16 thoughtful insights and good luck going forward.

17 MS. STEINGART: Thank you very much.

18 MR. PIZZURRO: Thank you.

19 MR. SNELLINGS: Thank you.

20 (Proceedings concluded at 5:30 p.m.)

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5 CERTIFICATE OF REPORTER

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8 Reporter and Notary Public, do hereby certify that the
9 foregoing record, pages 1 to 116 inclusive, is a true
10 and accurate transcript of my stenographic notes taken
11 on Monday, January 29, 2007, in the above-captioned
12 matter.

13
14 IN WITNESS WHEREOF, I have hereunto set my hand
15 and seal this #### day of MONTHMONTH, 2007, at
16 Wilmington.

17
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19 Kurt A. Fetzer RF

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